ELECTION OF LEADING CASES.

FOR THE USE OF B. L. STUDENTS.

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PART VIII.

Law of Evidence, Civil Procedure AND Limitation.

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SELECTION OF LEADING CASES.

VIII.

(i) EVIDENCE.

GUJJU LALL

v.

FATTEH LALL.*

[*Reported in I. L. R., 6 Calc., 171.*]

1880.
June 1.

The following judgment was delivered by

Mitter, J.:—In this case I have the misfortune to differ from his Lordship the Chief Justice and my other colleagues. But the importance of the question referred to the Full Bench, and the fact that the majority of the decided cases on the point are in favor of the view I take, I apprehend, justify me in stating fully the grounds of the conclusion at which I have arrived.

Sections 40 to 43 of the Evidence Act deal with the subject of relevancy of judgments, orders, or decrees of Court. Section 40 provides that the existence of a judgment, decree, or order is a relevant fact, if it by law has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. Section 41 deals with what are usually called judgments *in rem*; and by s. 42 judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. Then s. 43 provides that "judgments, orders, or decrees, other than those mentioned in ss. 40, 41, and 42, are irrelevant, unless the fact that such a judgment, order, or decree existed is relevant under some other provision of this Act."

It is clear that the judgment mentioned in the order of reference is not relevant under ss. 40 to 42. Therefore the question that we have to determine is, whether or not it is relevant under some other

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Present: Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

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v.
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provision of the Evidence Act, so as to bring it within the proviso of s. 43.

I am of opinion that it is relevant both under ss. 11 and 13. I shall deal with the question of its relevancy under s. 13 first. That section provides:—

"When the question is as to the existence of any right or custom, the following facts are relevant:—

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from."

The existence of a right to some immoveable property is in question in this case. That right was asserted and recognized in a previous proceeding of a Court of Justice, and it seems to me that it would not be unwarrantably straining the language of the section in question to say, that that proceeding was "a transaction" within the meaning of s. 13; because the word "transaction" in its largest sense means "that which is done."

If the words "transaction" and "right" be not construed in this way, judgments, decrees, and orders which were, before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence as administered in England, are considered, when not pleaded as estoppel, cogent evidence, would be excluded. Take for example the following illustration:—*A* brings a suit against *B* for enhancement of rent. *B* sets up a *mukurrari potta* in defence. A Court of competent jurisdiction finds the *potta* to be genuine, and dismisses the suit. After the lapse of several years, *B* sells his right to *C*, and *A* then ejects the latter forcibly. Thereupon *C* brings a suit against *A* to recover possession of the land covered by the *mukurrari potta*. A denies the *mukurrari* right, and alleges that *B* was a tenant-at-will. Before the Evidence Act was passed, the former judgment would have been conclusive evidence of *B*'s *mukurrari*; see *Soorjomonee Dayee* v. *Suddanund Mohapatter* (1) and *Krishna Behari Roy* v. *Brojesswuri Chowdhranee* (2). According to the law of evidence as at present administered in England, it would equally be considered conclusive, and, if not conclusive, at least as cogent, evidence in the subsequent suit. See Taylor on Evidence, section 1497.

(1) 12 B.L.R., 304. (2) L.R., 2 I.A., 283: I.L.R., 1 Calc., 144.

Was it intended by the Evidence Act to declare such judgment as this irrelevant? But it would be irrelevant, unless it be relevant either under s. 11 or s. 13. It is not relevant under s. 40, because its existence does not by law prevent the Court from "taking cognizance of the second suit." In the second suit it is the plaintiff who would seek to use it as relevant evidence, and it is apparent that he would not rely upon it to bar the cognizance of his own suit. It may be said that, under s. 13 of the present Procedure Code, the existence of the first judgment would prevent the Court from holding a trial of the issue as to the *mukurrari* right of *B*, and would therefore be relevant under s. 40. Supposing that the word "trial" in the section in question refers not only to a criminal trial, but also to a "trial" of an issue in a civil suit, the judgment in question would not have been relevant under this section before the present Procedure Code was passed, because, under s. 2 of Act VIII of 1859, it would not have prevented any Court from holding a trial of the issue as to the *mukurrari* title in the second suit. Then again, suppose in the second suit the judgment in question was not produced at or before the trial, and evidence bearing upon this issue was allowed to be adduced. Then suppose at a later stage of the case, the plaintiff produced the judgment in question and satisfied the Court, that, in the exercise of its discretionary power, it ought to receive it. Under these circumstances, I apprehend it would not be admissible under s. 40 of the Evidence Act, because its existence would and could not at that stage of the case prevent the Court from holding a trial of the issue regarding *B's mukurrari* title.

The judgment in question then, at least in some cases, not being admissible under s. 40, and it being evident that it is not admissible under ss. 41 and 42, it would be excluded altogether, unless its existence be relevant under some other provision of the Act. But if we construe the words "transaction" and "right" in s. 13 in their largest sense, it would be relevant under that section.

But it has been said that the law of evidence as administered in England, was the law of evidence in force in this country before the Evidence Act was passed; that the judgment of the description mentioned in the order of reference is and was not admissible under English law; and that if the Legislature intended to alter the law in this respect, it would have done so by a more clear and express provision than what is contained either in s. 11 or s. 13.

But I apprehend that the law of evidence as administered in England was not, in its integrity, the law in force in this country before the passing of the Evidence Act. The statutory provision on

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this subject was contained in the second paragraph of s. 24 of Act VI of 1871, which is to the following effect: "In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." This is only a re-enactment of the provision of s. 15 of Regulation III of 1793. Therefore, so far as the legislative enactments go, there is no foundation for this proposition.

Upon an examination of the decided cases on the subject, it would be found to be equally untenable.

The question was fully discussed by Mr. Justice Markby in *Doorga Doss Roy Chowdhry* v. *Norendra Coomar Dutt Chowdhry* (1), and he came to the conclusion that the rule of English law was not applicable "in all its strictness" to mofussil Courts in this country. I may as well cite here the observation of the Judicial Committee upon this point in the case of *Unide Rajaha Roje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo*(2):—

"With regard to the admissibility of evidence in the native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the native Courts in the East Indies, where it is perfectly manifest, the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice; we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it; and more especially where we find that it has been the practice of the Court to receive documentary evidence without the strict proof which might here be considered necessary; indeed, the consequence of so doing would inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this case, but almost in every other."

In another case(3) the Judicial Committee observed that "the native Courts of India in receiving evidence do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document authenticated

(1) 6 W. R., 232. (2) 7 Moo. I.A., 128, at p. 137.
(3) *Naragunty Lutchmeedavamah* v. *Vingama Naidoo*, 9 Moo. I.A., 66, at p. 90.

by the signature of the proper officer, as *primâ facie* evidence, subject to further enquiry if it were disputed."

There is, therefore, no foundation for the proposition that, before the passing of the Evidence Act, the law of evidence as administered in England was applied with all its technical strictness to mofussil Courts in the country. On the other hand, they were guided by their own practice, which was to a great extent moulded on principles of substantial justice.

Acting upon this principle, the Courts in this country, before the passing of the Evidence Act, always held that judgments of the description mentioned in the order of reference were admissible in evidence, see *Doorga Doss Roy Chowdhry* v. *Norendra Coomar Dutt Chowdhry* (1) and *Lala Ranglal* v. *Deonarayan Tewary* (2). In this latter case, speaking of a judgment of the description mentioned in the order of reference, Mr. D. N. Mitter says:—"That decisions like the one under our consideration have been frequently admitted in our Courts as evidence, is, I believe, a proposition beyond all dispute, and I do not see any reason why we should depart from this practice merely because it is opposed to the English law of evidence." The observation of Mr. Taylor in s. 1495 shows that, in his opinion also, the propriety of this rule of English law is questionable.

The law of evidence as administered in England was not, therefore, in its integrity, the law in force in the mofussil Courts of this country, and according to the practice of these Courts before the passing of the Evidence Act, decisions, like the one under consideration, were admitted in evidence. It seems to me that we ought not to come to the conclusion that this rule of law, founded as it was on a long practice of the mofussil Courts, was altered by the Evidence Act, unless that was clearly made out by the provisions of the Act itself.

Then, again, if we do not construe s. 13 in the way I have suggested above, the result would be, that a class of judicial proceedings, which were always considered as furnishing cogent evidence on the question of possession, would be excluded. I refer to awards under Act IV of 1840, and the corresponding sections of the Criminal Procedure Code. They have been invariably acted upon as affording valuable evidence of possession, even after the passing of the Evidence Act. They would not be relevant under s. 40, because, apart from other grounds, a proceeding under Act IV of

(1) 6 W.R., 232 (2) 6 B.L.R., 69.

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1840 before a Magistrate cannot be called "a suit" within the meaning of s. 13 of the Civil Procedure Code. Then if these awards are not admissible either under s. 11 or s. 13, they would not be relevant at all. I would hesitate to come to the conclusion that the Evidence Act was intended to exclude this class of evidence, unless it was made out as clearly as possible from its provisions.

Then it has been said that, in s. 13 of the Evidence Act, the Legislature intended to refer to incorporeal rights only, because, in other parts of the Act, for example in ss. 32 and 48, where the same word occurs in conjunction with the word "custom," it has been used in that sense. In the first place, it is by no means clear that ss. 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that, in the generality of cases, such rights are incorporeal, but it is by no means confined to that class only. Then in the next place, the word "right" is qualified by the word "public" in cl. 4, s. 32, and by the word "general" in s. 48. There is no such qualification in s. 13.

Moreover, no reasonable ground can be suggested for the necessity of restricting the meaning of the word "right" in s. 13 to the class "incorporeal." The contention of the appellant does not go to the extent of limiting the section to incorporeal rights of a public nature only. In that case, no doubt, it could be explained upon the ground that such a construction would have the effect of assimilating the provisions of the Evidence Act to the rule of English law on this subject. But the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle. It is difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or of private nature. Why should the transaction of the nature described in s. 13 be relevant when *A* claims a right of way over a piece of land held and owned by *B* and not so when he claims the land itself, appears to me inexplicable. It seems to me that the distinction would be arbitrary. I may as well here state a special consideration which leads me to think that the Legislature, by the use of the word "transaction," intended to include proceedings of Courts also. Is it at all reasonable to suppose that a mere assertion of a right by a person setting it up (whether that right is corporeal or incorporeal, it is quite immaterial for the purposes of this argument) would be admissible as evidence, and not the recognition of it by a Court of

Justice? Certainly it seems to me to be highly improbable that that was the intention of the Legislature.

For these reasons I am of opinion that the judgment mentioned in the order of reference is relevant under s. 13 of the Evidence Act.

Then, as regards its admissibility under s. 11, it has been said that a judgment is not a fact as defined in the Act itself. It is true that the reasons of a decision cannot be called "facts" within the meaning of the Evidence Act; but the result of a particular judgment, *i.e.*, whether it is favorable or unfavorable to a particular party, is, it seems to me, a fact as defined in that Act.

Illustration (*d*) of s. 43 is as follows:—"*A* has obtained a decree for the possession of land against *B*; *C*, *B's* son, murders *A* in consequence.

"Existence of the judgment is relevant as showing motive for a crime."

Now, the decree referred to in the illustration can only be relevant under ss. 7, 8 or 11. In all these sections I find the word used is "fact," consequently it follows that the word "fact" as defined in the Act itself, includes "decrees and judgments." Besides, the definition itself is comprehensive enough to include them.

If therefore the word "fact," as defined in the Evidence Act, is comprehensive enough to include decrees and judgments, then it seems to me that the judgment mentioned in the order of reference would be relevant, because it having recognized the right of the plaintiff to the present suit, by itself and in connection with the circumstance that it was so recognized, notwithstanding the evidence adduced by the defendant, makes the existence of the fact in issue in this suit highly probable.

Again, it may be said that if we are to admit the judgment under consideration as evidence, we must also hold that a judgment to which the person against whom it is sought to be used was not a party, would also be admissible, because the sections in question make no distinction between these two classes of judgments. It is true that that would be the consequence, but ordinarily no weight should be attached to a judgment between other parties. A similar objection may be urged against the rule of English law, by which, in matters of public interest, such as a claim of high way, evidence of reputation from any one is receivable (see s. 545 of Taylor on Evidence). For example, in a claim of highway alleged to be existing in an obscure village in the district of Nuddea, evidence of reputation of an inhabitant of Benares, evidently not possessing any information on the subject, would be receivable. But what

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weight would be attached to his testimony? Similarly, when a judgment would be sought to be used against a person who was not a party to it, ordinarily no weight ought to be attached to it. I say ordinarily, because there might be special circumstances which might give to it a weight which it otherwise would not have. For instance, if it be proved that a particular person, although not formally a party to a previous proceeding, was yet substantially represented in it, because the whole control of that proceeding was in his hands, it would be just and reasonable to allow to the previous judgment some weight in that case. It seems to me that the Legislature, in enacting these sections, have followed out the principle which was laid down by the Judicial Committee in the case already cited, *viz.*, to leave to a Court of Justice in each particular instance to assign the proper weight and value to a previous judgment that might be produced as evidence in a cause.

I would, therefore, answer the question in the affirmative.

NOTE.

The question before the Full Bench was as to the admissibility in evidence of judgments or orders not between the same parties. The majority of the Full Bench decided that such judgments were not admissible; Mitter J. took the opposite view, as will appear from the judgment set out above. The view of the majority was subsequently adopted by the Bombay, Madras and Allahabad High Courts, I.L.R., 10 Bom. 439; I.L.R., 11 Mad. 123 and I.L.R., 12 All. 1. The Judicial Committee, however, have held in three cases that judgments and orders though not *inter partes* are admissible in evidence: *Ram Ranjan* v. *Ram Narain*, I.L.R., 22 Calc. 533, L.R., 22 I.A. 60; *Bhitto Koer* v. *Kesho Pershad*, L.R., 24 I.A. 10; I.L.R., 19 All. 277; and *Dinamoni* v. *Braja Mohini*, I.L.R., 29 Calc. 187; L.R. 29 I.A. 24. In the first of these Privy Council cases, the judgment not *inter partes* appears to have been admitted to show that there had been a prior decision relating to the matter subsequently in issue. If so, the existence of the judgment was admissible as a 'fact' in issue under sec. 43 of the Evidence Act. In other words, the judgment was not admitted to establish the correctness of that decision. In the second case, *Bhitto Koer* v. *Kesho Pershad*, a judgment not *inter partes* was held admissible but on what grounds or under what section of the Code was not explained. It is possible that the judgment was admitted either because its existence was a fact in issue under secs. 5 and 43, or because its existence was relevant as explaining a fact in issue under secs. 9 and 43 of the Evidence Act. The *third case*, however, does expressly recognise that a judgment or order of a Court though not *inter partes* is admissible under sec. 13 as under other sections of the Code, as either a "transaction" or "instance."

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Gujju Lall v. Fatteh Lall.

The practical result therefore seems to be that the view taken by the majority of the Full Bench in *Gujju Lal* v. *Fatteh Lal* has been negatived by the Privy Council decisions, and the dissentient judgment of Mitter J. must be taken to be good law. It may be a question of some nicety, however, as to the purposes for which a judgment so held admissible may be used. Upon this matter the Full Bench case of *Tipu Khan* v. *Rajani Mohan*, I.L.R., 25 Calc. 522, (see *post*), leaves the question open. It is clear, however, that the findings in the earlier judgment are not necessarily admissible in the later litigation. Reference should be made to the judgment of Geidt J. in *Abinash* v. *Paresh*, 9 C.W.N. 402, in which the grounds of the Privy Council decisions are examined.

RAM RANJAN CHAKERBATTI

v.

RAM NARAIN SINGH.*

[Reported in I.L.R., 22 Calc., 533; L.R. 22 I.A. 60.]

The judgment of their Lordships was delivered by

1894.
December, 8.

Lord Shand:—The appellant in this *ex parte* case, in which two appeals have been consolidated, is the Raja of Hatempur, in *Zilla* Birbhum, and the *Zamindar* of a *taluk* in the Sonthal Pergunnas, called Koroya, within which are comprised the seven *mouzas* now in suit, of which the six *mouzas* embraced in the first suit, and the seventh, called Damdami, the subject of the second suit, form a subordinate *taluk* or estate known as Sitamarhi. The appellant was plaintiff in both suits, which were instituted on the 20th December, 1884, against the respective respondents in the first Court, which was that of the Sub-Divisional Officer of Jamtara. Both suits were, after a remand by the Deputy Commissioner of Sonthal Pergunnas, dismissed by the first Court on the 17th August, 1889, and on the appellant's appeals in both suits to the Court of the Deputy Commissioner those appeals were dismissed on the 19th December, 1889, and his second appeals from the judgments and decrees of the Deputy Commissioner's Court were again dismissed by the High Court at Calcutta on the 9th February, 1891.

During the settlement proceedings which took place in the Sonthal Pergunnas in 1875, the appellant claimed settlement with him directly of the seven *mouzas* in question, and a claim was made on behalf of the first respondent, Ram Narain Singh, for settlement with him as *Mokuraridar* and on behalf of the other respondents, in the first appeal, as *dar-mokuraridars* of the six *mouzas*, and a similar claim was made on behalf of the respondent in the second appeal, Mahomed Bhikan, *mokuraridar* of Damdami.

The Settlement Officer, finding that the respondents were in possession, and that they had been so for a long period of time, made the settlement with them on the 16th December, 1875, and referred the appellant to a regular suit to try the question of right; and about nine years thereafter the present suits were instituted in which the appellant seeks to have it declared that the respondents have no such rights *mokurari* or *dar-mokurari*, as they maintain, and to have possession given to him.

Present: Lord HALSBURY, HOBHOUSE, SHAND and DAVEY and Sir RICHARD COUCH.

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The appellant founds his claim to the *mouzas* in question, on the fact that they are locally within the *zemindari* belonging to him—a fact which is not disputed by the respondents; and in his plaint he alleged that his predecessor, and afterwards he himself, held possession of these properties, "by letting out the same in *ijara*. The term of the *ijara* expired in the year 1284." He does not state when or how he or his ancestors acquired right to the *zemindari*, nor when the term of the *ijara* or *ijaras* commenced.

In defence, besides a plea of limitation, with which it will be unnecessary to deal, the respondents in the first appeal, by their written statement, asserted that from a period before the year 1793, that is before the Decennial Settlement, they and their ancestors had been in possession of the *mouzas* in dispute as a *ghatwali* tenure, and they maintained that, having possessed respectively under permanent *mokurari* and *dar-mokurari* rights at fixed rents without variation for this long period of time, the appellant had no right to dispossess them. The respondents did not admit that the appellant had granted *ijaras* of the *mouzas* in question, and they alleged that the ancestor of the appellant had acquired the *zamindari* by purchase after their *mokurari* and *dar-mokurari* rights had been acquired and while they or their ancestors were in possession under a tenure which could not be defeated by a purchaser of the *zemindari*. As to the nature of the *mouzas*, they explain that these lands were originally dense jungle, infested with tigers and other wild animals, and that tanks and other improvements having been executed by the efforts and at the expense and with the labour of themselves and their ancestors the ground was now occupied by tenants. In point of fact the lands in question are now the site of seven villages.

The case was originally decided by the Judge of first instance in favour of the respondents on the ground of limitation, in consequence of the proceedings which took place before the Settlement Officer in 1875, and the lapse of time thereafter before the suit was instituted. But this decision was recalled by the Deputy Commissioner, and the case remanded for trial on the merits. Thereafter evidence, oral and documentary, was adduced for both parties, and the decision of all the three Courts, before which the suits came, proceeds on the evidence adduced.

It was not disputed by the Counsel for the appellant that the respondents and their ancestors have been in possession for a very long period of time, and there are indeed concurrent findings to this effect. It has been found by the Judge of first instance that the defendant Ram Narain Singh "has held at a fixed *mokurari*

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Ram Ranjan Chakerbatti v. Ram Narain Singh.

rental from before the Permanent Settlement, of Rs. 35 *sicca*, Government Rs. 37-5-4" (and it is conceded that if the *mokurari* rights be established the *dar-mokurari* rights can not be successfully challenged), and again in the judgment of the Deputy Commissioner on appeal it is stated that "there has been no serious attempt before me to prove that the rent payable by Ram Narain Singh and his ancestors has been varied since the time of the Permanent Settlement."

Further, it has been held by these Courts that the appellant has never held *khas*, or had immediate possession of the *mouzas* which have for upwards of a century been in the possession of the respondents and their ancestors. The original grant of a *mokurari* right is said by the respondents to have been granted by Gambhir Singh, the *ghatwal* of *taluk* Koroya, in 1777, by a lease of five villages granted to Bandhu Singh, direct ancestor of the respondent Ram Narain Singh at a fixed rent of Rs. 25 in perpetuity, and that in 1788 two more villages were added, the rent being raised to *sicca* Rs. 35.

The ground of judgment by the High Court is that "the Court may very properly presume the grant of a permanent *mokurari* tenure from long continuous possession at an invariable rental," and that "upon the evidence.....the lower Courts were amply justified in coming to the conclusion that the defendants were in possession long before the date of the plaintiff's purchase, and that it has not been proved that they derived their title from a mere *ijaradar*."

The ground of the appeals by the appellant to this Board, as stated in his case and by his Counsel at the Bar, is that this conclusion was reached by taking into view evidence which was not legally admissible, and in particular the evidence of certain decrees granted in proceedings relating to the *mouzas* in question, to which the predecessors of the appellant as *zemindars* were no parties. These decrees were pronounced in proceedings at the instance of Digumber Singh, the son of Gambhir Singh, by whom the original grant is alleged to have been made, against persons in possession of the *mouzas* in question, predecessors of certain of the respondents, the first dated in 1817 and the second in 1845. In the first of these cases, which originated in 1811, the plaintiff describing himself as owner of the ancestral *ghatwali* property of the *taluk* Koroya, claimed recovery of possession of the villages now in question from the persons then in possession. The defence was that Gambhir Singh, the father of the plaintiff, Digumber Singh, had granted permanent rights of *ghatwali* tenure at fixed rents amounting to Rs. 35, and that possession had followed, and the *ghatwali* duties

had been continuously performed, so that possession could not be decreed in the plaintiff's favour. The suit for possession was dismissed, but with leave to bring another suit for assessment of rent, but a decree was therein given for the arrears of rent for the past years, and for future rents at the rate of Rs. 35, which had been "hitherto paid." The subsequent suit for assessment of rent was instituted in 1842. The defence in the former case was repeated. It was maintained that the defendants held under permanent rights of *ghatwali* tenure at a fixed rent, and for performance of police duties, and that he had fulfilled these obligations, and that in such a case no assessment or enhancement of rent could be given; and this defence was sustained, and the action was dismissed in 1845. It was argued for the appellant that the judgments, of which he now complains, were arrived at by holding certain of the statements of the parties as recorded in the decrees or judgments of 1817 and 1845 as evidence against him in the present suits. Their Lordships do not think this complaint is well-founded. It does not appear to their Lordships that the statements of the parties recited in the decrees in these former cases were accepted as evidence in the present suits.

The Judge of first instance states with reference to these decrees: "I am of opinion that the documents produced by the defendants may be accepted as evidence in this case, as showing ancient possession, and that the title on which the defendants now rely was openly asserted as early as 1195, B. S., corresponding to 1788 A. D., and at subsequent dates, irrespective of the findings come to in these decrees. The orders passed in these decrees themselves would not be evidence against plaintiff's title, nor can they be considered as proving the defendants' title; but they may be accepted to show ancient possession, and to show that the title was asserted rightly or wrongly many years ago."

The Judges of the High Court say: "As regards the admissibility of the judgments to which exception has been taken, we observe that the lower appellate Court has only used those judgments as evidence that there was litigation between the parties thereto at the dates to which they relate. It uses those judgments to show that at those dates the so-called *ghatwal* was suing the so-called *mokurraridar* respecting the villages in suit, and that in those suits the parties asserted the same rights which they now assert. To this extent we think, that the judgments were admissible in evidence, even though the *zemindar* was no party to them."

It must be observed that by the judgment of 1817 a decree for

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rent of the *mouzas* now in question was given at the rate of Rs. 35 per *annum*, against the predecessors of the respondents. Their Lordships are of opinion that, although the predecessor of the Raja was no party to that litigation, it was competent to use the judgment as evidence showing the rent paid for the possession at and prior to that date, now nearly 8 years ago. Taken with the other evidence in the case, the respondents have thus established possession at a uniform rent for so long a period as to lead to the inference that the tenure was and is of a permanent nature.

As the case came finally to be presented for judgment on the evidence, the appellant had really proved nothing beyond his title as *zemindar* of the *taluk*, within which the villages were situated, which, indeed, was not disputed. This admitted title, no doubt, *primâ facie* imposed on the respondents the *onus* of establishing a defence which entitled them to continue in possession. On the other hand, the appellant has given neither statement nor evidence as to when or how his title had its origin. The only information given on the subject is to be found in certain statements in the decrees to the admission of which he himself objected. It is there said that about the year 1807 the appellant's grandfather had become the purchaser of the *zemindari* at an auction sale, at which date the decree also showed that others were in possession, paying rent to Digumber Singh, who claimed in the character of *ghatwal*. The only evidence of possession by the appellant related to dates so late as 1868 and 1869, in which years two *pottahs* were granted by the appellant in favour of Durga Pershad Singh of the whole of the *taluk* Koroya at rents of Rs. 550 and Rs. 600. There is no evidence that any rents were asked for or received by him from the possessors of the *mouzas* in question.

The case, therefore, stands in this position, that against the appellant's title to the *zemindari*, without any evidence of possession of any of the *mouzas* in question, there is proved uninterrupted possession by the respondents and their predecessors from a date before the appellant's ancestor acquired a title; and, indeed, it may be presumed for upwards of a century. The *mouzas* were held throughout that time for the payment of a uniform rent, and there are other considerations to be found in the parol evidence, and specially referred to in the judgment of the Judge of first instance, which support the view that the tenure was *ghatwali*. Their Lordships are satisfied that the presumptions in favour of a fixed and permanent *ghatwali* tenure, arising from the long-continued possession of the respondents and their predecessors at a uniform

rent, are sufficient to overcome the mere title of the appellant as *zemindar*. There is no reason to presume that by the purchase of the *zemindari* the appellant's ancestor acquired any right to set aside the rights then existing and exercised by the respondent's predecessors. On the contrary, the presumptions arising from possession are all to a contrary effect. Their Lordships are, therefore, of opinion that the judgments appealed against are well-founded, and they will accordingly humbly advise Her Majesty that the appeals ought to be dismissed.

Appeals dismissed.

TEPU KHAN

v.

RAJANI MOHUN DAS.*

[*Reported in I. L. R. 25 Calc., 522.*]

1898.
January, 31.

The facts of this case, so far as they are necessary for purposes of this report, and the arguments, appear sufficiently from the **order of reference** which was as follows :—

Banerjee, J.—"This appeal arises out of a suit brought by the plaintiff, respondent, for possession of a one-third share of a plot of land measuring 21 *bighas*, on the allegation that the said land appertained to resumed estate No. 9870 of the Dacca Collectorate, which belonged originally to the *pro-formâ* defendants ; that defendant No. 4 was in possession of two-thirds share of the same, having purchased it at a sale in execution of a decree ; that the plaintiff purchased the remaining one-third share thereof from the *pro-formâ* defendants after they and their predecessors had held possession of the same for upwards of twelve years ; and that the plaintiff had been unjustly kept out of possession of the land in dispute by the principal defendants since 1891.

"The principal defendants in their defence urged that the suit was barred by limitation; that the suit was also barred under sections 13 and 43 of the Code of Civil Procedure ; that the land in dispute originally belonged to one Mr. Panioty, who held it for upwards of a hundred years ; that by successive transfers the land came to the hands of the defendants ; and that defendant No. 4 with the object of ousting the defendants from the same, instituted several suits against them ; but being unsuccessful now caused the plaintiff to bring this suit. The defendant No. 4 supported the plaintiff.

"The first Court found after a local investigation by an Amin that 8 *bighas* and odd *cottahs* of the disputed land appertained to the plaintiff's estate, but it dismissed the suit altogether on the ground of limitation.

"Against the decision of the first Court the plaintiff preferred an appeal, and the principal defendants put in a cross-appeal, urging

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* *Present:* Sir Francis William Maclean, Knight, Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee, and Mr. Justice Jenkins.

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that the Munsif had improperly refused to admit certain judgments in evidence. The Lower Appellate Court has decreed the appeal of the plaintiff and dismissed the defendants' cross-appeal.

"In second appeal it is contended for the defendants, *first*, that the Court of appeal below was wrong in holding that the judgments tendered in evidence by the defendants were inadmissible; and, *secondly*, that the decree in favour of the plaintiff should in any case have been limited to a one-third share of 8 *bighas* and odd *cottahs* only.

"The second point need not detain us long, as the learned vakil for the respondents concedes that the decree ought to be limited in the manner contended for on behalf of the appellants.

"The first point, however, involves a question which is not altogether free from difficulty.

"If the cases of *Gujju Lall* v. *Fatteh Lall*(1), and *Surendro Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*(2), upon the authority of which the Lower Appellate Court has held the judgments tendered in evidence for the defendants to be inadmissible, are good law, the first ground urged before us must fail. But if those cases have in effect been overruled by the decisions of the Privy Council in *Ram Ranjan Chakerbarti* v. *Ram Narain Singh*(3), and *Bitto Kunwar* v. *Kesho Pershad*(4), then the question arises whether the judgments referred to are admissible in evidence.

"In the two cases relied upon by the Lower Appellate Court, namely, *Gujju Lall* v. *Fatteh Lall* (1), and *Surendro Nath* v. *Brojo* (2), it was held by this Court that a former judgment, which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point decided, unless between the same parties or those claiming under them. But in the case of *Ram Ranjan Chakerbarti* v. *Ram Narain Singh* (3), it was held by the Privy Council that a judgment passed in a suit to which the plaintiff was no party, was admissible against the plaintiff as evidence showing the rent paid; and in *Bitto Kunwar* v. *Kesho Pershad* (4), their Lordships of the Privy Council, speaking of the judgment in a former suit against one of the defendants, Bacha Tewari, observe: "This decision is not conclusive against Bacha Tewari as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible

(1) (1880) I. L. R., 6 Calc., 171. (2) (1886) I. L. R., 13 Calc., 352.
(3) (1894) I. L. R., 22 Calc., 533; L. R., 22 I. A., 60.
(4) (1887) L. R., 24 I. A., 10.

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in evidence against him." These two decisions of the Privy Council must be taken to have in effect overruled the cases relied upon by the Lower Appellate Court. That being so, the question arises whether, apart from those cases, the judgments referred to in the argument were admissible in evidence against the plaintiff, respondents.

"Now the provisions of the Indian Evidence Act expressly relating to judgments are sections 40 to 44. The judgments which are said to have been improperly rejected in this case not being evidence of any of the descriptions referred to in sections 40, 41 and 42, and they not having been excluded on any of the grounds mentioned in section 44, it is not necessary to dwell upon the provisions of those sections. The question we have to consider is whether the judgments, which have been held to be inadmissible by the Courts below, are really admissible under section 43 of the Evidence Act, which enacts that 'judgments, orders or decrees other than those mentioned in sections 40 41, and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.'

"I am inclined to think that this question ought to be answered in the affirmative, and that the existence of the judgments under consideration, or at any rate the existence of one of them, is relevant under sections 11 and 13 of the Evidence Act.

"The judgments that were tendered in evidence and rejected as inadmissible by the Courts below are three in number being (as I gather from the judgment of the Lower Appellate Court and from paragraph 10 of the written statement of defendants No. 1—3) (1) the judgment in suit No. 742 of 1887 brought by the present defendant No. 4, Protab Chunder Das, co-sharer of the plaintiff, against the present defendants for possession of two-thirds share of the land now in dispute; (2) the judgment in suit No. 165 of 1892 brought by the said Protab Chunder Das against the said defendants; (3) the judgment in suit No. 1219 of 1886 brought by one Emdad Ali against the present defendants. Though the relevancy of the last two may not be quite clear, the existence of the first-mentioned judgment seems to be a relevant fact, as well under section 11 of the Evidence Act, as under section 13. This may be seen from the following considerations.

"First as to the relevancy of the judgment in suit No. 742 of 1887 under section 11. The existence of the judgment, that is, the circumstance that that particular judgment was passed, is clearly a fact within the meaning assigned to the term in section 3. Now

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the existence of the judgment (which will be established by the judgment being filed) shows that a suit had been brought by plaintiff's co-sharer Protab Chunder so far back as 1887 against the principal defendants for possession of his two-thirds share of the disputed land, and that suit was dismissed. The plaintiff's case now is that the said Protab Chunder was in possession of the two-thirds share in dispute, while he and his vendor were in possession of the remaining one-third share down to a period within twelve years before the institution of the present suit. And the existence of the above-mentioned adverse judgment taken in connection with the other facts of the case might, if the judgment had been admitted in evidence by the Court below, have been found to make the non-existence of the plaintiff's possession and the existence of the defendants' possession highly probable within the meaning of section 11 of the Evidence Act. I cannot say it would have that effect, because, sitting here in second appeal, it is not open to us to enter into questions of fact. But I do say that it might have that effect, and if it might, a substantial error in the procedure consisting in the improper rejection of evidence is made out which may possibly have produced error in the decision of the case upon the merits within the meaning of section 584, clause (*c*) of the Code of Civil Procedure.

"Next as to the relevancy of the judgment in suit No. 742 of 1887 under section 13. If the existence of the judgment is not a transaction within the meaning of clause (*a*) of section 13, it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (*b*) of section 13, in which the right of possession now claimed by the defendants was claimed. It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used in the section. The judgment, therefore, is in my opinion relevant under section 13.

"If such judgments were not relevant under either of the two sections 11 and 13, they could not be admissible in evidence, as the Privy Council have held them to be in the two cases referred to above.

"The strongest argument against the admissibility of such judgments in evidence is, to use the language of a well-known

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writer on the Law of Evidence (*see* Taylor on Evidence, 9th edition, section 1682): 'That no man ought to be bound by proceedings to which he was a stranger and over the conduct of which he could, therefore, have exercised no control.' But in the first place, the judgments in question are sought to be used, not as binding and conclusive evidence, but only as evidence for what they are worth; the weight to be attached to the evidence being left to the Court to determine. And in the second place, the reason stated above, though it is a good reason for excluding from consideration as against a stranger, the evidence afforded by a judgment, so far as it is the opinion of a Court upon materials in the placing of which before the Court the stranger could have had no control, does not appear to hold equally good where what is sought to be taken into consideration is the evidence afforded by the existence of the judgment as to a litigation relating to the right in question and the way in which that litigation terminated. For such collateral purposes, judgments are admissible in evidence against strangers under the English Law. See *Davies* v. *Lowndes*(1). It is true that their Lordships of the Privy Council in the two cases referred to above while overruling in effect the decision of this Court in *Gujju Lall* v. *Fatteh Lall* (2) and *Surendro Nath* v. *Brojo Nath* (3) do not refer to any section of the Evidence Act. But I may add that the view I take is supported to some extent by the cases of *Hira Lal Pal* v. *A. Hills* (4); *Venkata Sami* v. *Venkatreddi* (5); and the *Collector of Goruckhpur* v. *Pallakdhari Singh* (6). It has sometimes been said [see *Ranchhod Dass* v. *Bapu Narhar* (7)] that if the Legislature in this country had intended to make judgments admissible in evidence against strangers, as it was an important departure from the English Law, the intention would have been expressed, not indirectly by the provisions embodied in section 11 and 13, but directly by some express provision in that part of the Evidence Act which relates to judgments. I think the answer to this remark is furnished by section 43, which is one of the group of sections relating to judgments, and which contains the provision applicable to cases like the one before us, relating to the relevancy of judgments as evidence against strangers.

"For these reasons I think the judgment in suit No. 742 of 1887 ought to have been admitted in evidence. But as the point raised

(1) (1843) 6 M. & G., 471 (520)
(2) (1880) I.L.R., 6 Calc., 171.
(3) (1886) I.L.R., 13 Calc., 352.
(4) (1882) 11 C.L.R., 528.
(5) (1891) I.L.R., 15 Mad., 12.
(6) (1889) I.L.R., 12 All., 1.
(7) (1888) I.L.R., 10 Bom., 439.

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is not altogether free from doubt and difficulty, and is one of frequent occurrence and of great importance I agree with the learned Chief Justice in thinking that the case should be referred to a Full Bench, the main question for determination being whether the judgments referred to above to which the plaintiff respondent was no party are admissible in evidence against him under sections 11 and 13 of the Evidence Act, or under any other provision of law.

"**Maclean C. J.**—I concur in thinking, as the point often arises and is of great importance, that this case should be referred to a Full Bench, but I reserve my opinion upon the point submitted for decision."

The following opinions were delivered by the Full Bench (MACLEAN C. J., and MACPHERSON, TREVELYAN, BANERJEE, JENKINS, JJ.)

Maclean C. J.—Although I was a party to this reference, I am not quite satisfied, after the discussion which we have heard to-day, that the question submitted in its broader aspect really arises. In my opinion, the judgments in question are not admissible in evidence in this suit, because now that the matter has been fully laid before us, it appears that the subject-matter of the present suit is not identical with the subject-matter in the previous suits, in which those judgments were delivered. In the previous suit the subject-matter was to recover a two-thirds share of the property in question, but in the present case it is a suit by a different plaintiff to recover the remaining one-third share. The subject-matter, therefore, of the two suits is not identical; the title to the one-third share may be, and apparently is, different from that of the other shares. In this view the judgments which were sought to be admitted as evidence in this case were irrelevant, and, therefore, not admissible as evidence.

This point, so far as I recollect, I am speaking only from memory, was not very clearly brought to the attention of Mr. Justice Banerjee and myself on the previous occasion, and if it had been, we might possibly have thought that this reference was not necessary. But as the two cases decided by the Full Bench in this Court, the case of *Gujju Lall* v. *Fatteh Lall* (1) and a later case of *Surendro Nath Pal Chowdhry* v. *Brojo Nath Pal Choudhry* (2) have been referred to, I feel bound to express my opinion that, having regard to the recent observations of the Privy Council in the case of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (3) and in the more

(1) (1880) I. L. R., 6 Calc., 171. (2) (1886) I. L. R., 13 Calc., 352.
(3) (1894) I. L. R., 22 Calc., 533; L. R., 22 I. A., 60.

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recent case of *Bitto Kunwar* v. *Kesho Pershad* (1), the Full Bench decisions referred to must be regarded as materially qualified, because it is clear from the decisions in the Privy Council that under certain circumstances, and in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.

The decree in the present suit in favour of the plaintiff must be limited to a one-third share of 8 *bighas* and odd *cottahs* only; subject to the decree being varied to that extent the appeal fails, and must be dismissed with costs, including the costs of the reference.

Macpherson, J.—I agree in the view expressed by the learned Chief Justice.

Trevelyan, J.—I also agree.

Banerjee, J.—I agree with the learned Chief Justice in holding that the rule laid down in the cases of *Gujju Lall* v. *Fatteh Lall* (2) and *Surendro Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (3) must be taken to have been materially qualified by the decisions in the Privy Council in the cases of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (4) and *Bitto Kunwar* v. *Kesho Pershad* (1). Upon the question whether the judgment mentioned in the referring order is admissible or not, I feel bound to say that I am not quite satisfied that the mere fact of the subject-matter of the present suit being a one-third share in the property in dispute, whereas the subject-matter of the previous suit was the remaining two-thirds of the same property, would make any real difference in the case, having regard to the nature of the case made by the parties to the suit. For the reasons given by me in the referring order, I still have my doubts as to whether the Lower Appellate Court was right in excluding that judgment altogether. But I must add that my doubts on the point are not so strong as to justify by expressing myself in the language of positive dissent.

Jenkins, J.—I agree with the learned Chief Justice.

Decree varied.

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(1) (1897) L. R., 24 I. A., 10.
(2) (1880) I. L. R., 6 Calc., 171.
(3) (1886) I. L. R., 13 Calc., 352.
(4) (1894) I. L. R., 22 Calc., 533: L. R., 22 I. A., 60.

SARAT CHUNDER DEY,

v.

GOPAL CHUNDER LAHA.*

[*Reported in I. L. R.*, 20 *Calc.*, 296 ; *L.R.* 19 *I.A.* 203]

The judgment of their Lordships was delivered by

1892. *June*, 23.

Lord Shand.—This appeal has been brought against a judgment of the High Court at Calcutta. The case originated in the Court of the Munsif of Sealdah, against whose decision an appeal was taken to the District Judge of the 24 Pergunnahs. Accordingly the High Court was precluded by the provisions of sections 584 and 585 of the Civil Procedure Code, 1882, from reviewing the judgment of the District Judge on the facts which he held to be established, and under the appeal had a question of law only for determination.

The appellants, being desirous of having the scope of their present appeal enlarged to the effect of allowing them to question the judgment of the District Judge in so far as it involved matters of fact as well as of law, presented an application to be allowed to appeal generally against that judgment, but their Lordships, on the 26th July, 1890, refused this application. The appeal therefore now presents only a question of law for decision, that question being whether, on the facts as determined by the judgment of the District Judge, the respondent Gopal Chunder is estopped from maintaining his present claim.

The case has assumed considerable importance because of the argument which has been maintained as to the principles regulating the law of estoppel, founded on the authority not only of the judgment of the High Court at Calcutta in this case, but also of other judgments in the High Courts at Madras and Allahabad, to which it will be proper that their Lordships should hereafter especially refer.

The facts which have given rise to the present controversy, as these are to be found in the judgment of the Disirict Judge and the deeds and documents to which he refers, may be shortly stated.

Gopal Chunder having in 1885 purchased from Ahmed Hossein and Rahimunnissa Bibi, a son and daughter respectively of Umed Ali Shah Ostagar, the shares to which they had succeeded on the

* *Present* : Lords Watson and Morris, Sir R. Couch, and Lord Shand.

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death of their father of certain heritable property specified in the schedule to the original plaint, obtained a conveyance of these shares in his favour, dated the 28th July, 1885. In December following he filed his plaint against the appellants, who had been in possession of the property for about three years, claiming to have a declaratory decree that the sellers to him, Ahmed Hossein and Rahimunnissa Bibi, had held the right to the shares of the property purchased by him, and that he might, as purchaser from them, have a decree of partition of the lands, and be put into possession of their respective shares accordingly. In defence the appellants explained that their predecessors had purchased the property, including the shares of Ahmed Hossein and Rahimunnissa Bibi, with certain other properties, at an auction sale in May, 1882, which took place under a decree in a mortgage suit obtained by one Munshi Kalimuddin against Arju Bibi, the widow of Umed Ali Shah Ostagar, and mother of Ahmed and Rahimunnissa. They alleged, in their written statement, that Arju Bibi was the true owner of the property, having acquired right to it from her husband Umed in 1878; that Arju Bibi after her husband's death, which occurred on the 6th August, 1879, on the 22nd April, 1880, mortgaged the properties for a sum of Rs. 2,000 borrowed by her from Kalimuddin, who, in consequence of the failure in repayment of the money lent, obtained a decree on the 7th December, 1881, declaring a mortgage lien on the property, and that, under the execution decree thereafter obtained, the property was sold, when it was purchased by the appellants' predecessors in title.

According to the appellants' statement, Arju Bibi became the absolute proprietor of the property in question by virtue of a conveyance (*hiba-bil-ewaz*) bearing to be granted for an onerous consideration, granted in her favour by her husband, dated the 4th January and registered on the 15th February, 1878, (about 18 months before he died), and it was in virtue of this title that, about nine months after her husband's death, she granted the mortgage already mentioned in favour of Kalimuddin, on the narrative that she had borrowed Rs. 2,000 from him "to meet my necessity." They alleged that Umed Ali, "in lieu of the money due to his wife Arju Bibi on account of her dower, made a *bonâ fide* gift of the disputed properties, and other properties, in favour of Arju Bibi, and put her in possession of the same"; and they further alleged that, even if the *hiba* by Umed in favour of his wife, Arju Bibi, was not effectual to defeat the rights of succession of his children, Ahmed and Rahimunnissa, from whom the plaintiff derived his title, yet

they were estopped by the actings of their father during his life time, and separately by their own actings after his death, from maintaining the invalidity of the *hiba*, and from either themselves, or through any purchaser from them, challenging the mortgage by Arju Bibi in favour of Kalimuddin, which is the foundation of the appellants' title.

In his plaint the plaintiff alleged that the *hiba* by Umed in favour of his wife was a fraudulent and collusive deed intended to defeat the rights of his creditors; that there was no such dower due as was stated in the deed to be the consideration for granting it; that no possession of the properties was ever given to Arju Bibi, but that the transaction was *benami* merely, and *benami* without even possession. And besides issues to try the question whether the *hiba* had been followed by possession and was a valid instrument, a further issue was sent for trial in these terms:—"Is the plaintiff's claim barred by the rule of estoppel, and was defendant a *bonâ fide* purchaser for value?

The defence founded on the *hiba*, apart from the question of estoppel, was finally disposed of by the judgment of the District Judge. The Munsif, dealing with the issue on this part of the case and the evidence bearing on it, had come to the conclusion that the *hiba* was a "valid and binding document," not indeed a deed which could be supported on the ground of valuable consideration, but "a deed of gift, followed by seizin as required by Mahomedan law," and he accordingly dismissed the suit. But the District Judge reversed his judgment, and gave a decree in terms of the plaintiff's claim. In doing so, for reasons fully stated, he concludes his judgment on this part of the case by saying:—"I hold that the deed of January, 1878, is invalid. It is invalid as a simple gift, because Arju Bibi did not get possession till after her husband's death; and it is invalid as a deed for consideration, because there was no consideration for it."

It follows that the only question for consideration now is that of estoppel. The plaintiff's predecessors in title, Ahmed Ali, and Rahimunnissa Bibi, by virtue of their rights of succession to their father, were entitled to dispose of their respective shares of the property in question unless they were estopped from so doing either by their father's acts or by their own conduct after his death.

The plea of estoppel was held by the judgment of the Munsif to be well founded, mainly if not entirely, on the ground of the actings of Umed Ali. He held that not only had Umed Ali put his wife

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into ostensible possession of the property, but that he had proclaimed to all the world that he had made a valid *hiba*, and that, after granting that deed, in his dealings with the property he was only the agent of his wife, who was the true owner. The District Judge reversed this decision, taking a different view of the facts on which the Munsif's judgment rested, and his decision has been affirmed by the High Court.

In dealing with question of estoppel, now, it is obviously necessary to consider separately the alleged acts of Umed Ali, and the actings of his children, Ahmed and Rahimunnissa, with their respective legal consequences. It was very strongly urged upon their Lordships, chiefly on the authority of the case of *Luchmun Chunder Geer Gossain* v. *Kali Churn Singh* (1) 1873, referred to in the judgment of the High Court, that the acts of Umed Ali were sufficient to create an estoppel as against his children in a question with the purchaser from their mother Arju Bibi, the widow and *benamidar*, as she must be taken to have been after the judgment of the District Judge.

The section (115) of the Indian Evidence Act I of 1872, which regulates the law on this subject is in these terms :—" When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The mortgage which is the foundation of the appellant's title was not granted by Arju Bibi, the *benamidar*, during her husband's life and in circumstances showing that he consented to her granting the deed, in which case estoppel might have been successfully pleaded against his heirs in answer to any challenge of the deed by them. It was granted as already stated, after the death of Umed, and consequently after his children, Ahmed and Rahimunnissa, had become proprietors of certain shares of the property held in title by their mother as *benamidar*.

In the case of *Luchmun Chunder* (1) a similar state of facts occurred, for there, as here, the mortgaged was granted by the widow after her husband's death. But in that case the husband, Ubotar Singh, had never himself held the title to the property there in question in his own name. The title was derived from a third party and taken directly to his wife, and, according to the narrative of the conveyance,

(1) 19 W. R., 292.

the price was paid from her *stridhan* fund. He was never in possession of it. His wife took possession and retained it, and, as stated by the High Court in their judgment in the present case, by a long series of public acts and declarations, he did all he could to cause his wife to bear towards the public the character of owner. There were thus continuous declarations and acts by the husband calcutated to cause any person dealing with the widow to believe that she was and had been the proprietor in her own right and in possession of the property purchased.

In the present case the facts are entirely different. The District Judge has held that, "in fact, Umed Ali did nothing beyond execute and register the deed of gift." "There is," he observes "no evidence that he held out Arju Bibi to the world as the owner of the property. He never parted with the possession." There was no mutation of names in the Government registers, and practically nothing different from an ordinary *benami* arrangement which, as the District Judge observes, is "too common among Mahomedans to deceive anybody." It is clear that in this state of the facts there is no foundation for the plea of estoppel in so far as founded on the actings of Umed. The appellants cannot point to any declaration, act or omission on his part which they can successfuly maintain could warrant them in believing, and acting on the belief, that Arju Bibi was the owner of the property which they purchased, and this has been expressly found by the District Judge.

Accordingly there remains only the question whether the plaintiff is estopped from maintaining the invalidity of the *hiba* in consequence of the declarations or acts of his authors in title, Ahmed and Rahimunnissa, or either of them. The District Judge has held it to be proved that they had both reached majority at the date of the mortgage, at least this is plainly implied in the language he uses. His expression is they "were practically, if not technically, infants," and "presumably under their mother's influence." Accordingly it must be taken that they were of age to consent to the mortgage being granted, or by their acts or representations to bar themselves from challenging it.

As regards Rahimunnissa, the learned Counsel for the appellants did not profess to be able to refer to any representation or acting on her part which could bar her from challenging the validity of the *hiba*, or the title of any one taking a conveyance by Arju Bibi, or taking a title by virtue of the mortgage granted by her. There is no case of estoppel presented against her on account of personal

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representations, acts, or omissions; and so soon therefore as it is settled that her claim, or that of the plaintiff in so far as he derives title from her, is not barred by any representations or acts on the part of her father, it follows that to the extent of her interest the claim of the plaintiff to the possession he demands must be allowed.

But in regard to Ahmed, and the plaintiff's claim as a purchaser from him, a very different state of facts has been proved. The High Court in dealing with this question in their judgment say:—"The circumstance of Ahmed Hossein having attested the deed of mortgage to Kalimuddin is relied on as estopping him from questioning his mother's power to execute the document"; adding: "we are unable to hold that the mere witnessing by him of that document . . . . . or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the *hiba* to confer upon Arju, and the fact that Arju had no power to create, a good title as against him, of which knowledge on his part there is no proof." The view of the law to be applied in the circumstances as thus stated will be immediately referred to, but their Lordships must, in the first instance, observe that the acting of Ahmed in reference to the granting of the mortgage by his mother went a great deal further than his being merely a witness to the execution of the deed; as to the effect of which, as a circumstance from which his assent to the deed might be inferred (had that been the state of the facts), their Lordships think it unnecessary here to express any opinion.

The facts, however, as appearing on the face of the mortgage itself (which is referred to in the judgment of the District Judge) are not that Ahmed was a witness to the execution of the deed, for the witnesses were other persons, but that he really represented his mother in the whole transaction. He acted with Munshi Golam Hossein as *am-mukhtar* on her behalf under a power of attorney authorising him to do so; he signed the mortgage on her behalf and in her name; and he and Golam Hossein received the money advanced by Kalimuddin, as appears from the official certificate by the Sub-Registrar endorsed on the deed.

Their Lordships are very clearly of opinion that these actings on the part of Ahmed create an estoppel against him, or any one claiming in his right, from disputing the title of Arju Bibi to grant the mortgage to Kalimuddin. They amounted to a distinct declaration by him to the lender that the *hiba* in favour of Arju Bibi was a valid deed, or in any view, that if the document was open to legal

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objections, Ahmed as the person entitled to challenge the deed waived his right to do so, and consented for his interest to represent and to hold the *hiba* as valid, and consequently as giving a legal right to Arju Bibi as the proprietor to grant the mortgage. There was a distinct representation by Ahmed, professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands. It is, in their Lordships' opinion, impossible to take any other view of the effect of Ahmed's conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money; ; and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. It has been frequently said, in cases of this class, that the creditor is bound to make inquiry into the validity of such a title as Arju Bibi the borrower here possessed, and the obligation applies with great force in this case, in which the *hiba* was granted without consideration, and, as the least inquiry would have shewn, without any possession having followed on it. But inquiry, or indeed any anxiety as to the title of Arju Bibi to grant the mortgage as proprietor in virtue of the *hiba* in her favour was made quite unnecessary by the representation and conduct of Ahmed, who was (so far as his share of the property was concerned) the sole person having a title or interest to challenge the validity of the *hiba*, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him.

In this state of the facts the terms of section 115 of the Evidence Act directly apply to the case, for Ahmed, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that Arju Bibi, as proprietor under the *hiba*, was entitled to grant the mortgage, neither he, nor his representative the plaintiff, can be allowed to deny the truth of what was thereby represented, believed, and acted on.

From the terms of the judgment of the District Judge it rather appears that he might have sustained the plea of estoppel but for certain considerations which are thus stated in different parts of his judgment. He says :—"There is also nothing to show that Ahmed Hossein was not under a *bonâ fide* mistake when he supported the *hiba*. He knew nothing of its execution, and was a minor when his father died. Until disabused by the High Court decision, he may have honestly believed that the *hiba* was genuine . . . . . There is nothing to show that Ahmed Hossein committed any fraud or contemplated committing any."

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The District Judge further indicates that even if the plea of estoppel might have been sustained in other circumstances, yet the purchasers would be open to the objection that they cannot avail themselves of the plea as being "*bonâ fide* purchasers for value and without notice," because before the purchase was made under the mortgage sale certain judicial proceedings before the High Court (referred to in a passage in the judgment just quoted) had been taken by or on behalf of Pakjan, a minor son of Umed Ali in which it was determined that the *hiba* in favour of Arju Bibi was invalid, of which proceedings the purchasers were said to have been cognizant. The High Court in the closing part of the judgment under appeal also say: "under these circumstances we can not hold that the Additional District Judge, either in determining as he has done, that no estoppel was created, or in holding as he has done, that the defendants do not occupy the position of *bonâ fide* purchasers without notice, was wrong; and this absolves us from considering the further question which we might perhaps have otherwise found it necessary to determine, *viz.*, whether if Ahmed and Rahimunnissa were estopped from disputing the *hiba*, that estoppel would have been binding on the plaintiff, in the absence of proof or knowledge on his part of the circumstances that gave rise to it."

With reference to the views indicated in these passages of the judgments now under review, their Lordships think it right to say that it would make no difference in the effect to be now given to the plea of estoppel against a purchaser under the mortgage sale, though it clearly appeared that Ahmed when he acted as he did in the mortgage transaction was under the belief that the *hiba* was a valid deed which he could not set aside; nor is it of any moment that he neither contemplated committing any fraud, nor, in fact, committed any fraud by his acts or representations. And their Lordships must further observe that, as the mortgage was effectual as a valid title to Kalimuddin, the lender, under which in default of payment of the money lent he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the *hiba*, and that it had been originally invalid.

In regard to the first of these points, the section of the Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that

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he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the Statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell), with the full concurrence of Lord Kingsdown, in the case of *Cairncross* v. *Lorimer* (1860),(1):—"The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct . . . . . I am of opinion that,

(1) 3 H. L. C., 829.

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generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him, seek to challenge after a considerable interval of time.

There is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to, or in the leading authorities of *Pickard* v. *Sears*(1), *Freeman* v. *Cooke*(2), and *Cornish* v. *Abington*(3). In the more recent case of *Carr* v. *London and North Western Railway Company* (1875) (4) in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord Esher) pointed out that no doubt in certain cases where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently, but, as his Lordship explained a fraudulent intention is by no means necessary to create an estoppel and accordingly he mentions other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton Laing & Co.* v. *Lafone* (1887) (5) by a unanimous judgment of Lord Esher and Lords Justices, Fry and Lopes. In that case Lord Esher said: "An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes

(1) 6 A. & E., 469. (2) 2 Exch., 654.
(3) 4 H. & N., 549. (4) L. R., 10 C. P., 316.
(5) L. R., 19 Q. B. D., 68.

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a false statement negligently though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel." To this statement it appears to their Lordships it may be added that there may be statements made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterized as 'misrepresentation," as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of Ahmed was either that the *hiba* in favour of Arju Bibi was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid.

Reference has already been made to certain Indian cases which were cited and founded on in the course of the argument. These were the cases of *Ganga Sahai* v. *Hira Singh* (1880) (1) in the High Court of Judicature at Allahabad, and *Vishnu* v. *Krishnan* (1883) (2) in the High Court at Madras. In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. It was expressly said: "There must be deception, and change of conduct in consequence." The latter case was one in which an adoption having taken place, the alleged adopted son claimed to set aside a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. The deed was liable to be set aside as *ultra vires* if the adoption was valid; but it was maintained separately that in any view the defendant was estopped from maintaining the invalidity of the adoption by a series of acts on the part of the adopting father, which had induced the belief on the part of the plaintiff that the adoption was valid, and in consequence of which the adopted son had abstained from claiming a share in the inheritance of his natural family. In the end the adoption, which was that of a sister's son, was held, after a proof of the customary law of Malabar, to have been valid, but before allowing the proof the Court decided that the case of estoppel failed.

It would be most difficult to reconcile this decision with that of the case of *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (3) already referred to, and the views of this Committee as there expressed; and their Lordships would also have great difficulty in holding, as the High Court did, that a series of act by which

(1) I.L.R., 2 All., 809. (2) I.L.R., 7 Mad., 3. (3) 19 W.R., 292.

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an adoption is professedly made and subsequently recognised, constitute a representation in law only and not of fact. But apart from this, the Court seems to have taken the view that in order to create estoppel, the representations founded on must have been made with an intention to deceive; and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England. It was there said (1): "The term 'intentionally,' was no doubt, adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard* v. *Sears*(2) and explained in *Freeman* v. *Cooke*(3) and *Cornish* v. *Abington*(4), it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has been stated by the English Courts." Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in England by their substituting the word "intentionally" in the rule established for the word "wilfully" which had been previously used, it seems to their Lordships that the term "intentionally" was used in the Evidence Act (1872) for the purpose of declaring the law in India to be precisely that of the law of England. Baron Parke, in the case of *Freeman* v. *Cooke*(3), in effect stated that the term "wilfully" used in the previous case of *Pickard*(2) was really equivalent to "intentionally," in these words: By the term "wilfully" . . . . "we must understand if not that the party represents that to be true that he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act upon that belief must be held to have done so "intentionally" within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. And to this view effect was given in the case of *Cornish* v. *Abington*(4) and the later cases.

It is unnecessary to quote the passages (pp. 8 and 9 of the report in the case of *Vishnu* v. *Krishnan*,(5) indicating that in the opinion of

(1) I.L.R., 7 Mad., 8. (2) 6 A. & E., 469.
(3) 2 Exch. 654. (4) 4 H. & N., 549. (5) I. L. R. 7 Mad., 3.

the High Court it was necessary to prove an intention to deceive in order to make a case of estoppel. Their Lordships have already said enough to make it clear that they differ from the views to that effect expressed in that case, and in the case of *Ganga Sahai* v. *Hira Singh*(1).

As already stated, the plaintiff further maintained that the appellants could not avail themselves of the plea of estoppel against him because before their predecessors made the purchase under the mortgage sale they were aware that it had been held by the High Court in another suit that the *hiba* which was the foundation of the title under which they purchased was invalid; but as already explained, their Lordships have no difficulty in repelling this contention. It may be true, and in any case it may be assumed to be true, that the appellants' predecessors in title knew of the decision referred to. But it is equally true that whatever might have been held as to the invalidity of the *hiba* in a proceeding at the instance of Pakjan, Ahmed, or any one claiming in his right, was precluded by Ahmed's acts and representations from maintaining the invalidity of the *hiba*, of the mortgage granted by his mother so far as regards his share of the property. In any question with Ahmed or his representatives, Kalimuddin had obtained a valid mortgage, and as he had himself a valid title so he could give a good title to a purchaser under a mortgage sale, whatever might be the state of knowledge of the person purchasing. Their Lordships therefore are clearly of opinion that the appellants are not precluded from maintaining, as they do successfully, that the plea of estoppel is good against Ahmed, and consequently good against the plaintiff, in so far as regards the share of the property which Ahmed might have claimed as succession.

On the whole case their Lordships, on the grounds thus fully stated, will humbly advise Her Majesty to discharge the decrees of all the Courts below, and make a decree in favour of the plaintiff for Rahimunnissa's share only, and that he get possession of that share by distinct partition, with costs in proportion in all Courts. The plaintiff, however, must pay the costs of this appeal, in which the appellants have obtained a substantial success.

Appeal allowed. Decree varied.

(1) I. L. R., 2 All., 809.

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NOTE.

This decision of the Judicial Committee is the leading authority on the subject of estoppel by misrepresentation. It further points out that the terms of the Indian Evidence Act (Sec. 115) do not enact as law in India anything different from the law in England on the subject of estoppel. The principle that if one person by a representation made or by conduct amounting to a representation, has induced another to act as he would not otherwise have done and thus to alter his position, the person who made the representation ought not in equity and justice to be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who has acted on it. In other words, the essence of the matter is that the determining element is not the motive or the state of knowledge of the party making the representation, but the *effect* of his representation.

For an application of the rule laid down in the leading case, see *Helan Dasi* v. *Durgadas*, 4 C. L. J. 323.

BALKISHEN DAS

v.

W. F. LEGGE.

[*Reported in I. L. R., 22 All., 149; L.R. 27 I.A. 58.*]

Their Lordships' judgment was delivered by

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November, 11.

Lord Davey.—In and prior to the year 1872 Hari Das and the appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on the 27th April 1889. The present appellants are Balkishen Das and the two sons and heirs of Hari Das. The respondent was at that time the owner of a *taluka* called Patilah in the district of Jaunpur and was also half-sharer of certain indigo factories known as Basharatpur, and carried on the business there in partnership with one De Momet, his co-sharer. By a deed dated the 8th April, 1872, the *taluka* was mortgaged to Hari Das and Balkishen Das for Rs. 1,25,000 and by another deed of the same date (called a deed of estimate) the factories were also mortgaged to them as security for Rs. 60,000, which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 1,90,000 and further advances were needed for carrying on the business. The respondent in these circumstances bought out his partner De Momet and became sole owner of the factories and solely interested in the business. A fresh *bandobast* or settlement was thereupon made between him and the bankers and was carried into effect by three deeds, of which two relating to the *taluka* were dated the 4th February 1873 and the third relating to the factories was dated the 6th April 1873.

The first deed of 4th February, 1873, was, on the face of it, an absolute sale by the respondent to the bankers for the price of Rs. 1,50,000, which was expressed to be paid in the following manner, *viz.*, the bankers retained out of the Rs. 1,50,000 the sum of Rs. 1,37,333-6-0 principal with interest up to date which had, by calculation been found due by the respondent to the bankers under the mortgage deed of the *taluka* dated the 8th April 1872, and retained the balance Rs. 12,666-10-0 in part payment of the

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amount then due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

The other deed of the 4th February, 1873, was in the following terms :—

"We, Babus Hari Das and Balkishen Das, sons of Babu Padam Das, proprietors of the firm of Babu Madhubun Das and Dwarka Das, caste Gujrati, resident of mohalla Gwaldas, in the city of Benares, do declare as follows :—

"The vendor, Mr. William Francis Legge, having, under the sale deed dated 4th February, 1873, sold absolutely, for Rs. 1,50,000, his *zamindari* right and property in the entire 16 annas of *taluka* Patilah, pargana Ungli, in the district of Jaunpur, comprising 25 villages, original and attached, together with all sir, sayer items, high and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands ; village sites, ponds, *kutcha* and *pucca* wells, collection houses, tenants' quarters, bamboo clumps, groves and detached fruit and timber trees of all sorts, and stone and wooden mills, inclusive of all the *zemindari* rights and interest appertaining to the said *taluka*, without exclusion of any right or property, to us, the executants, has caused mutation of names to be effected. We, the executants, therefore, of our own free will and accord, covenant and declare that if the said vendor pays on 1st March 1876, the amount of Rs. 1,65,000 in a lump sum, we shall sell to the said vendor the whole of the said *ilaka* sold, as it exists at present, for the said amount of Rs. 1,65,000 and we shall cause everything connected with mutation of names, &c., to be done, neither we nor our heirs shall have any objection thereto. If we or our heirs raise any objection to receive the money and relinquish the property, the vendor shall be competent to deposit the said amount in cash in the treasury, by virtue of this agreement, and obtain possession over the *ilaka*, we shall have no sort of objection to it. It has further been stipulated by the executants and the vendor that if the amount of the estimate money of the Basharatpur concern should keep varying on account of alterations made by consent of us, executants, from year to year, then the vendor shall be liable to pay along with the sum above mentioned, whatever sum may be found to be due at that time by him to us executants. The Sahib shall not be competent to effect a sale until the payment of the estimate money relating to the factories of the Basharatpur concern. We shall recover from the vendor any amount of arrear that may be due to us by the cultivators by making an assignment thereof in favour of the vendor, and after the

expiry of 1st March 1876, the said vendor shall not be competent either to pay the money or to make the purchase and the conditions of this deed of agreement shall be deemed to be null and void."

The question between the parties in this appeal is whether the two deeds together constituted a mortgage of the *taluka* or an out-and-out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the respondent to a large amount on account of the Basharatpur concern. By the third deed dated the 6th of April 1873, the sum of Rs. 44,223-14-3 was found due from the respondent up to date, and he mortgaged the factories for Rs. 75,000, out of which the balance was paid off and money was provided for working the factories during the current year.

On the 3rd of March 1874 another deed of estimate was executed for that year, and finally by a deed dated the 25th March 1875 the respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953-4-3. There is no deed of defeasance to this deed and it was admittedly an absolute sale.

It should be noticed that on the execution of the deeds of 4th February 1873, the necessary mutation of names was made and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the *taluka*.

The respondent did not buy back or redeem the property on the 1st of March 1876. But on the 5th of November 1894 he commenced the present action for redemption of the *taluka*, alleging that the deeds of 4th February 1873 constituted a mortgage by conditional sale with possession thereof. The defendants and present appellants, on the other hand, contended, that the transaction was an absolute sale with a contract of resale, and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale and that the respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92

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of the Indian Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammadans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "*Kutkubala*" or "*bai-bil-wafa*" that the mortgagor should make himself personally liable for the repayment of the loan (see Macpherson on Mortgages, 5th edition, p. 11.)

By Bengal Regulaton I of 1798, intituled "a regulation to prevent fraud and injustice in conditional sales of land under deeds of *bai-bil-wafa* or other deeds of the same nature," provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the Dewanny Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land, the principal sum only need be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he has been in possession. By Regulation XVII of 1806 the mortgagor under deeds of this description was empowered to redeem the land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

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In the case of *Pattabhiramier* v. *Venkatarow Naicken*(1), it was decided that according to the ancient law of India a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the regulation applies the English doctrine of an equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (*c*) of section 58 of the Transfer of Property Act 1882: "Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by a conditional sale." The Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The appellants argue that the language, whether of this Act or of the Regulations, shows that in order to attract their provisions there must be underlying ostensible arrangements for sale a real substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai* v. *Bhagwan Din and others*(2). Their Lordships decided that case on the language of the deeds then in question, which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption after the expiry of the date fixed. The appellants contend that such ought to be the conclusion in the present case, seeing that the parties did stand in relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The respondents, on the other hand, contend that a conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties. The second deed or *ikrarnama* provides

(1) (1870) 13 Moo. I. A., 560.
(2) (1890) L. R., 17 I. A. 98; I.L.R., 12 All., 387.

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that if the bankers object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury "by virtue of this agreement" and obtain possession over the *ilaka*. This provision at once suggests a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while, on the other hand, the words exactly describe the procedure under the Regulation. Again, the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 1,65,000. The practical effect of this was to consolidate the debt on the factories account with the principal sum mentioned in the deed and to give the bankers a security on the *taluka* for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned, and if it is to some extent a mortgage it may well be held to be so entirely. There was also some evidence, though not very precise, that the property in the year 1873 was worth considerably more than Rs. 1,50,000. This was accepted in the Court below, but their Lordships do not place much reliance upon it.

Their Lordships hold that the transaction was intended to be, and was, a mortgage by conditional sale, and they will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

NOTE.

In this case the Judicial Committee ruled that under Sec. 92 of the Indian Evidence Act, oral evidence of intention is inadmissible for the purpose either of construing deeds or of proving the intention of the parties to the instrument.

The Calcutta High Court decided in the Full Bench case of *Kashinath* v. *Chandi Charan*, 5 W. R. 68, that although a document cannot be varied by oral evidence, evidence of acts and conduct of the parties is admissible to prove the true nature of the instrument. The same view was subsequently affirmed by another Full Bench in the case of *Priyanath* v. *Madhu Sudan*, I.L.R. 25 Calc. 603, in which it was held that in spite of Sec. 92, oral evidence of the acts and conduct of parties (such as oral evidence that possession remained with the vendor, notwithstanding the execution of a deed of out and out sale), is admissible to prove

that the deed was intended to operate only as a mortgage. Since the decision of the Privy Council in the leading case, however, there has been considerable divergence of judicial opinion as to its precise effect upon the two Full Bench decisions.

The High Courts of Bombay and Madras have held that the Full Bench decisions have been practically over-ruled, and that oral evidence of acts and conduct can no longer be held admissible. [*Dattoo* v. *Ram Chandra*, 7 Bom. L. R. 669, *Achutaramaraju* v. *Sabbaraju*, I.L.R. 25 Mad. 7]. The Calcutta High Court on the other hand has adhered to its previous view, and it has even been argued that the Privy Council decision supports that view, there being a distinction between mere oral evidence of intention and evidence as to the acts and conducts of the parties, *Khanbar* v. *Ali*, I.L.R. 28 Calc. 256, *Mahomed* v. *Nazar*, I.L.R. 28 Calc. 289.

(ii) CIVIL PROCEDURE.

RUN BAHADUR SINGH

v.

LUCHO KOER. *

[*Reported in I. L. R., 11 Calc., 301 ; L. R. 12 I. A. 23.*]

1884.
December, 13.

Their Lordships' judgment was delivered by

Sir R. P. Collier.—In this case Run Bahadur Singh sued Mussamat Lucho Koer, the widow of his deceased brother, Murlidhar Singh, to recover possession of the property held by Murlidhar, on the ground that the brothers were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a Hindu widow's estate in the property. She further maintained that this question had been conclusively determined in her favour in a former suit between her and the plaintiff.

The Subordinate Judge decided the plea of *res-judicata* against her, but held in her favour that the brothers were separate in estate, and gave her a decree.

The High Court determined the plea of *res-judicata* in her favour, and, as it applied to the whole action, affirmed the decree. Nevertheless, they inquired into the question of fact, and held that the brothers were joint in estate.

From this decree Run Bahadur has appealed.

The widow has not appealed against the decree, nor could she, because it is in her favour, but she has appealed against the finding that the brothers were joint in estate.

It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it. If she had not appealed, she could have supported the decree, on the ground that the Court ought to have decided the question of separation in her favour. But inasmuch as no objection has been taken at the bar to her cross-appeal, and as (the appeals being consolidated) practically the inquiry would have taken the same course, and the costs would

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* *Present*: Lord Fitzgerald, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

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have been nearly the same, whether she had appealed or not, their Lordships are not disposed, under the peculiar circumstances of the case, themselves to take the objection.

The question of *res-judicata* arose in this way:

After the death of her husband she applied for a certificate, under Act XXVII of 1860, enabling her to collect the debts of her husband. This application was opposed by the plaintiff, who set up the case of joint-ownership, on which he now relies. A certificate was granted to her, and the grant was confirmed on appeal.

Though this proceeding has been relied upon by her as constituting *res-judicata*, Counsel at their Lordships' bar have not argued that it has this effect, inasmuch as the only question to be determined in this proceeding is one of representation, not otherwise of title.

Subsequently she brought (in 1874) a suit in the Court of the Munsiff against a tenant for the recovery of rent, to the amount of Rs. 53. Run Bahadur intervened, asserting precisely the same title to the property of his brother as he sets up in the present suit, *viz.*, joint interest and ownership. An issue was framed in these terms:—

"Did the plaintiff or her deceased husband realize the rent of the 8-annas separately and in a state of separation before this, or did the plaintiff's husband during his life time realize the rent with Run Bahadur jointly and after him, did Run Bahadur alone receive rent of the entire 16-annas."

Witnesses were called on both sides, and the Munsiff decided in favour of the present defendant.

On appeal to the Subordinate Judge the decision was affirmed.

The jurisdiction of the Court of the Munsiff is limited to Rs. 1,000. The only appeal from it is to the District Court, from which there is only a special appeal, on points of law, to the High Court.

By Act X of 1859, exclusive jurisdiction was conferred on Collectors to determine rent suits, with an express limitation of their power in cases of intervention (s. 77) to determine the "actual receipt and enjoyment of the rent," with a provision that their decisions should not affect title.

By Act VIII of 1869, s. 33 (of the Lieutenant-Governor of Bengal in Council), rent suits were re-transferred to the ordinary tribunals, to be regulated like other actions, by the Code of Civil Procedure (Act VIII of 1859) without any re-enactment of the limitation which had been imposed on the jurisdiction of the Collector.

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It has been contended on behalf of the defendant that this being so the Munsiff had jurisdiction to try the question of title if it were necessary for the purpose of determining to whom rent was due, and that the plaintiff, having intervened and raised an issue directly involving the question of title, is bound by the judgment.

This is the opinion of the High Court.

Their Lordships regard it as having been decided that such a judgment as that of the Munsiff is not conclusive.

The Indian Act in force relative to estoppel by *res-judicata* was at the time of the institution of this suit Act VIII of 1859, s. 2, which is in these terms :—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

With reference to this enactment it has been observed by the Board(1) :—

"Their Lordships are of opinion that the term cause of action is to be construed rather with reference to the substance than to the form of action, ... and that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res-judicata* founded on the principle *nemo debet bis vexari pro eadem causa*."

The same view has since been expressed by this Board (2).

A similar view had been expressed by Sir Barnes Peacock, then C. J. of Bengal, in the well-known case of *Mussumat Edun* v. *Mussumat Bechun*(3).

He there adopted the definition of judgments conclusive by way of estoppel given by De Grey, C.J., in the *Duchess of Kingston's case*, in answer to questions put by the House of Lords: "The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court," and Sir Barnes Peacock proceeded thus to define "concurrent jurisdiction" :—

"In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would

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(1) *Soorjeemoee Dayee* v. *Saddanand Mohapatter*, 12 B.L.R., 304.

(2) *Krishna Behari Roy* v. *Brojeswari Chowdranee*, L.R., 2 I.A., 283 ; I.L.R., 1 Calc., 144.

(3) 8 W.R., F.B., 175.

have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

This doctrine has been expressly affirmed in a recent case before this Board (1), decided since the judgment appealed against.

It is true that when the suit in this last mentioned case was brought the governing statute as to *res-judicata* was Act X of 1877, s. 13., which is in these terms :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction, in a former suit between the same parties, or the parties under whom they or any of them claim, litigating under the same title."

But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law.

A suit for interest amounting to Rs. 1,600, on a bond for Rs. 12,000, was brought in the Court of an Assistant Commissioner, whose jurisdiction was limited to Rs. 5,000; the Assistant Commissioner held that the real amount for which the bond was given was Rs. 4,790, and not Rs. 12,000, and, interest on the smaller sum having been overpaid, dismissed the suit.

It was held that his judgment was not *res-judicata* as to the amount for which the bond was given, inasmuch as this amount was beyond the limits of his jurisdiction.

Their Lordships approve of the statement of the law by Sir Barnes Peacock above quoted, and proceed to observe: "In their Lordships' opinion it would not be proper that the decision of a Munsiff upon (for instance) the validity of a will or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or adoption; . . . . . by taking concurrent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided."

If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire.

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(1) *Mistr Rugbobar Dial* v. *Rajah Shee Balch Singh*, L.R., 9 I.A., 197; I.L.R., 9 Calc., 439.

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Assuming, therefore, that the question of title was directly raised in the rent suit, their Lordships are of opinion that the judgment in that suit is not conclusive in this.

Having regard, however, to the subject-matter of the suit, to the form of the issue (which has been above set out), and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive.

It now becomes necessary to consider the question of fact whether at the death of Murlidhar the brothers were joint or separate in estate. Their Lordships agree with the observation of the High Court that the tendency of the Courts in this country to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse.

Although the judgment in the rent suit is not conclusive, still their Lordships cannot help attaching some weight to the decisions of the Munsiff and the Subordinate Judge, both natives who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit, in which the plaintiff set up the same case was the same; it was the same, also, and the case and evidence much the same, in a proceeding before a Magistrate requiring the plaintiff to enter into recognizances to keep the peace. All the Native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it.

The following facts require to be stated in order to the understanding of the merits of the case. Bishen Singh was the father of the plaintiff and of Murlidhar; the three, together with a grandson, formed a joint Hindu family. Bishen was the reversionary heir to the Raj of Tikari, the estates appertaining to which had descended to two brothers, Hetnarain and Modenarain, the former of whom owned 9 annas, the latter 7 annas. Both brothers had died; Hetnarain leaving a widow, Rani Inderjit, who adopted a son, Ramkishen; Modenarain leaving two childless widows. Inderjit (called in the case "the Maharani") had granted to Bishen a *mokurrari* lease of a considerable quantity of land, which formed the greater part of the joint property of the father and his two sons. Some time in 1860 or 1861, Bishen left his home on a religious pilgrimage, his whereabouts was long unknown, he was vainly sought by his sons, and did not return until about 1868.

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During his absence the following occurrences took place. His two sons brought a suit in his name under the alleged authority of an *am-muktarnama* from him against the Maharani, her adopted son, and the widows of Modenarain, disputing the adoption and claiming possession of 9 annas of the property, and a declaration of right to 7 annas. That suit had been dismissed in the District Court, and again on appeal in the High Court on the ground that the *am-muktarnama* was not genuine.

The Maharani had, on the *mokurrari* rent not being paid, seized the property, put it up for sale, and bought it herself.

It is further alleged by the defendant, and denied by the plaintiff, that the brothers separated in estate in 1862 or 1863 (*Fasli*, 1260.)

It may be as well to say at once that their Lordships agree with both Courts that separation at this time (as alleged on the written statement of defendant) is not satisfactorily proved; indeed, whatever might have been the desire of the brothers to live and act separately, they could not effect a partition of the family property without the consent of their father; but if the father on his return was informed of their desire to separate, this may have influenced his action in the transaction which has now to be referred to.

The suit of the sons having been dismissed upon the ground that it was brought without their father's authority, he was in no way bound by the result, and might have instituted a similar suit himself. Under these circumstances, he came to an arrangement with the Maharani and Ramkishen, which is stated by the defendant to be as follows:—

Bishen was to admit the adoption and relinquish all claim to the 9 annas, insisting only on his claim in reversion to the 7 annas. And in consideration of this the Maharani and Ramkishen were to re-grant the land (in Patna District), the subject of the former *mokurrari*, together with other lands in Gya by another *mokurrari*. Bishen, however, having devoted himself to a religious life, desired to relinquish his property to his sons, whom he described as "men of this world" in equal and separate shares; but according to the inveterate practice of Hindus desired this to be done in the form of grants to *fursidars*, one *fursidar* in each grant to be the servant of and to represent one of his sons, the other *fursidar* the other son. His reason for this is said to have been to defeat any claim against them by one Munshi Amir Ali, who had advanced the money to conduct the suit which has been mentioned.

In pursuance of this arrangement Bishen executed two *ladavi ikrarnamas*, in very nearly the same terms, on the 2nd August 1868,

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He therein states that he undertook a long pilgrimage after the death of Hetnarain, and proceeds: "Having gone to different *tiruths* I was so deeply engaged in the worship of God that there remained no knowledge of the circumstances of my native place." He alleges that on his return he found that improper use had been made of his name by his sons in their suit, repudiates that suit, and renounces all claim to the 9 annas share held by Ramkishen, whose adoption he admits, retaining only his claim in reversion to the 7 annas; this instrument was executed also by his sons.

Whereupon the Maharani and Ramkishen execute on the same day another *ladavi ikrarnama*, admitting his reversionary claim to 7 annas.

The *mokurrari pottahs* follow on on the 4th of August 1868.

That relating to Gaya confers on Bunwari Rawat and Kewal Rawat certain property of large extent, "from generation after generation, at the definite and consolidated annual uniform *jama* of Rs. 1,709 in equal shares." That relating to Patna is to the same effect, the grant being to Mitan Rawat and Ducki Rawat. These grants are made by the Maharani and confirmed by Ramkishen. The grantees are household slaves, and it is admitted on both sides that they were *fursidars*. It therefore becomes necessary to go behind the deeds and ascertain the true nature of the transaction.

The view of the defendant has been stated, *viz.*, that the two brothers were the real *mokuraridars*, and were to hold separately.

That of the plaintiff is that they were the real *mokurraridars* and were to hold jointly.

The High Court are of opinion that Bishen was the real *mokurraridar*, a case set up by neither party.

The defendant called the Maharani the only surviving principal of the transaction except the plaintiff, Ramkishen having died before the evidence was taken in this suit. But the Maharani and Ramkishen had both given evidence for the defendant in the certificate and rent suits, and their depositions are on the record. They are witnesses of high station, having no interest in the cause, speaking of transactions in which they were principal parties, their evidence is clear, throughout consistent, and appears to their Lordships conclusive, unless it be wilfully false.

The Maharani deposes:—

"Both Babu Run Bahadur Singh and Babu Murlidhar Singh were *mokurraridars* in equal shares, *i.e.*, at the time of taking the *mokurrari* Babu Bishen Singh had divided the property to both the above Babus in equal shares, that the brothers might not fall out

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with each other, and with this view the name of a man of each of them was entered fictitiously in the *mokurrari* . . . . . Babu Run Bahadur Singh and Babu Murlidhar Singh were separate, and therefore the name of a man of each of them was mentioned fictitiously.

It is true that the *fursidars* gave evidence on behalf of Run Bahadur, the more powerful party (as he has acquired by purchase from the widows of Modenarain a present interest to the amount of 7 annas in the Raj), that they were slaves of Bishen, but, in their Lordships' opinion, this evidence cannot counter-vail the much stronger evidence that each was the slave of one of the brothers.

The Maharani further states that Bishen had told her that the "two brothers were fighting with each other; he had made a partition between them."

Ramkishen states :—

"At the time of taking the *mokurrari*, Babu Bishen Singh took it in the name of Kewal Rawat, servant of Run Bahadur Singh, and in the name of Bunwari Rawat, servant of Murlidhar Singh. The Rawats are not the real parties. Babus Run Bahadur Singh and Murlidhar Singh were *mokurraridars* in equal shares. . . . . For this reason it was taken in the names of the servants of the two persons, that no dispute should arise between the two persons."

Again :—

"Babu Bishen Singh took the *mokurrari* for Babu Run Bahadur and Babu Murlidhur. At the consultation held on that and other subjects of *jama* and the selection of *mokurrari mouzahs*, Run Bahadur and Murlidhar were both present. Babu Bishen Singh was the person who actually took the *mokurrari*."

On being asked :

"How came you to know that Babu Bishen Singh made over the *mokurrari* to Babus Run Bahadur and Murlidhar?"

The witness answered,

"I know having been told by Bishen Singh and Run Bahadur and Murlidhar."

In other parts of their evidence these statements are in substance repeated.

Run Bahadur was called as a witness, and, although he in general terms denied that there was a separation between him and his brother, he gave no evidence with respect to the above transaction, at which Ramkishen alleged he was present, nor did he deny having said to Ramkishen what Ramkishen deposed to. The rest of his evidence may be described as mainly consisting of witnesses who deposed that

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the brothers lived and messed jointly, against whom a nearly equal number of witnesses for the defendant may be set off who deposed that they lived and messed separately.

The evidence of the Maharani and Ramkishen is confirmed by Hafiz Syed Ahmed Reza, a pleader and *zemindar*, who appears to have long been on intimate terms with the two brothers, and gives the same version of the transaction. He says Babu Bishen Singh said "these men are of the world," therefore, according to his wish, the *mokurrari* was granted to Run Bahadur and Murlidhar in the fictitious names of other persons, and he speaks to the negotiations at the time of the preparation of the deed.

Soon after the completion of the transaction Bishen Singh retired to Benares, where he died.

The evidence of the Maharani and Ramkishen, though accepted by the Sub-Judge, has been discredited by the High Court; that of Reza, on whom the Subordinate Judge placed much reliance, has been altogether discarded.

With respect to the Maharani and Ramkishen the High Court observe: "They, no doubt, have deposed to statements made by Bishen Singh, Run Bahadur, and Murlidhar admitting separation; but we think their evidence in this respect, though important, must be taken with very great reserve. They were both witnesses in the rent suit, and it is not often that in a suit of that character people of their standing come forward to give evidence, unless they have a strong feeling in the matter. Reading their evidence we find, in our opinion, a strong bias in favour of the defendant."

Their Lordships are unable to concur in these observations.

If the Maharani and her son knew and were able to prove that Run Bahadur was setting up a false case against his brother's widow, it appears to their Lordships greatly to their credit, instead of their discredit, that they should overcome their reluctance to give evidence in order to protect her. Bias in a witness may be inferred from his being fouued to misstate facts, from his telling monstrous or improbable stories, or showing malicious temper against one of the parties. But nothing of that kind can be imputed to either of these witnesses. They appear to have answered the questions put to them straightforwardly, and their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the plaintiff, but to infer this is to beg the question in dispute.

Another reason for discrediting the Maharani is that the plaintiff had declared his intention, and instituted a suit, to set aside the

compromise, whereby it is assumed that he had incurred her hostility.

The answer to this is, that she had given substantially the same evidence in the rent suit, before he had declared such an intention.

With respect to Syed Ahmed Reza, the High Court observe :—

"The Subordinate Judge has relied on the following statement by the witness : 'At the time of the execution of the *mokurrari* there was a talk between Run Bahadur and Murlidhar, with respect to the mention of the names of the *benami* persons, each enquired of the other which of his men would stand *benamidar* for him. At last the names of those nominated by each of them were entered'. But the Subordinate Judge has failed to consider this gentleman's statement in cross-examination, 'I do not recollect whether I had made a draft of the *mokurrari pottah* in favour of the plaintiff and Murlidhar. I do not know where that deed was engrossed in stamp, or where it was signed, but several had witnessed it here. When the deed was written and read I was not at Tikari (the place of execution); when the deed was presented to our signature as witnesses there was no mention made as to whose *benamidars* are the persons whose names are mentioned in the deed'.

"So this gentleman contradicts himself, and though practising as a vakil seems wilfully to have followed the too common custom of this country of attesting a deed subsequently and at a different place to its execution."

For these reasons they place no reliance whatever on his evidence.

The High Court suppose Reza to have been a witness to one of the *mokurrari pottahs* but this is a mistake, he was a witness only to the *ladavi ikrarnamas*; therefore the accusation of having witnessed a deed where it was not executed, together with the contradiction in his evidence, disappear. But even if the supposed contradictory statements related to the same deed they seem by no means irreconcileable. The consultation as to the choice of *benamidars* must almost necessarily have been before the actual execution of the document, and the witness, speaking of a transaction many years ago, may well have meant by "the time of execution of a deed," the time when it was being prepared for execution.

Their Lordships regard it as dangerous for a Court of Appeal to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it which did not occur to that Court, and which if his attention had been called to it he might have been able easily to explain.

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Their Lordships adopt the evidence of these witnesses as credible and uncontradicted as to the circumstances attending the grant of the *mokurrari pottahs*, which they regard as the crucial point in the case, and are of opinion that whether the brothers had or had not separated, or attempted to separate, before they received the *mokurrari* grants in severalty, and were separate from that time.

The rest of the evidence is mainly in accordance with this view. With respect to the relations of the brothers, and the dealing with the property between the execution of the *pottahs* and the death of Murlidhar in February 1872, it is enough to say that in the opinion of their Lordships the evidence of the defendant preponderates; proof is given of separate payments by some tenants, and separate receipts, and some *jamma-wasil-baki* papers are produced by tenants showing that they held under separate landlords.

Their Lordships cannot concur with the High Court in accusing the defendant of "manufacturing" certain *jamma-wasil* papers; the rent accounts, not having been made up for the last years of her husband's life, were made up by her directions after his death, but there was no attempt to represent them as other than they were, nor do they appear to have been relied upon by her; the term "manufacture" is not applicable to them.

After Murlidhar's death there is no question that his widow remained for more than two years in possession of her late husband's share of the property undisputed by Run Bahadur till her application for a certificate in 1874, when, for the first time, he set up his present case. During that time Run Bahadur only claimed the right to deal with his own half-share; he raised money on mortgages of that half-share only; he brought several actions in the name of Ducki Rawat, his *fursidar*, in respect of that share only, in the plaints to which actions it is stated that the property was held in separate moieties. He let 2 annas of certain property in which he and his late brother had held 4 annas, leaving the widow to deal with the remaining 2 annas. Indeed the High Court find, in agreement on this point with the lower Court, that, after Murlidhar's death, the plaintiff and defendant enjoyed the property separately. But the High Court explain this by the supposition that "Run Bahadur, who seems to have been a somewhat easy-going person, was willing that the defendant should enjoy the 8 annas by way of maintenance."

An "easy-going person" appears an expression singularly inapplicable to a man who was bound over to keep the peace towards the widow on account of continued oppression and cruelty. It is

to be observed that this was not his case—that he denied the fact of her possession which has been found by both Courts against him.

Their Lordships adopt the view of the Subordinate Judge, who observes: "After the death of Murlidhar Singh, Run Bahadur Singh, for some time considering him separate, took proceedings only in respect of a moiety."

For these reasons their Lordships are of opinion that the direct evidence of the transaction in 1868, the form of the grant, "in equal shares," and the subsequent dealing with the property, all point to the conclusion that the brothers were separate at and before the death of Murlidhar; that consequently the finding on this question of the Subordinate Judge was right; and that of the High Court was wrong. Therefore, although the defendant is not entitled to a decree on the issue of *res-judicata* on which the High Court have given it her, she is entitled to a decree on the issue of separation of estate, and the decree in her favour will stand. The only order which their Lordships can humbly advise Her Majesty to make is, that the decree be affirmed, and both appeals dismissed. As the defendant has succeeded on the merits of the case, she should have the costs of these appeals and the costs of the appeals to the High Courts.

Appeals dismissed.

NOTE.

The decision of the Judicial Committee in this case may be treated as authority for two important points on the subject of *res judicata*. In the first place a decision upon an issue which is no more than incidental and subsidiary to the main question does not operate as *res judicata* in a subsequent suit where the principal question has to be decided. In the second place, a decision to be *res judicata*, must be that of a competent Court.

Upon the first point reference may be made to the judgment of Knight Bruce V. C. in *Burrs* v. *Jackson*, 65 R. R. 457. As an illustration, a decision in a rent suit upon the question of title incidentally raised is not *res judicata* in a subsequent title suit. As another example, it may be observed that when the decree of the Court is not based upon a finding but is in spite of it, such finding does not work an estoppel; for instance, if in a suit for ejectment by a landlord, the tenant defendant pleads want of notice and permanency of tenure and the Court dismisses the suit on the ground of want of notice though holding that the tenancy was non-permanent, the finding upon the latter point will not operate as *res judicata* in a subsequent suit between the parties. See *Thakur Magundeo* v. *Thakur Mahadeb*, I. L. R., 18 Calc., 651, which shows that the decision of the Full Bench

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in *Niamut* v. *Phatu*, I. L. R., 6 Calc., 319 has been impliedly over-ruled by the decisions of the Privy Council in *Run Bahadur* v. *Lucho Koer* and *Kali Krishna* v. *Secretary of State*, L. R., 15 I. A. 186.

As regards the second point, it is clear from the leading case as also the decision of the Privy Council in *Mirir Raghobar Dial* v. *Sheobux*, I. L. R., 9 Calc., 439, L. R., 9 I. A. 197, that neither a question of title nor any other question can be *res judicata* by reason of a finding of a Court inferior as regards its pecuniary limit to the Court trying the question. See *Shibu Kaut* v. *Baban Kaut* I. L. R., 35 Calc., 353: 7 C. L. J. 470, which shows how the earlier decision must be taken to have been over-ruled by the two decisions of the Judicial Committee.

ISHAN CHUNDER SIRKAR

v.

BENI MADHUB SIRKAR.

[*Reported in I. L. R., 24 Calc., 62.*]

1896.
September, 4.

The judgment of the Full Bench was delivered by BANERJEE, J. (PETHERAM, C. J., and O'KINEALY, MACPHERSON, and TREVELYAN, JJ., concurring.)

Banerjee, J.—The respondent in this appeal is the assignee of a mortgage decree ordering sale of the mortgaged properties. The appellant is the purchaser of one of the mortgaged properties at a sale in execution of a money decree against the mortgagor, the date of his purchase being subsequent to that of the mortgage decree.

Upon a previous application by the respondent for execution of the decree by sale of the property purchased by the appellant, the Court on the appellant's objection ordered that all the mortgaged properties be sold together; and after that order, the execution case was struck off.

A fresh application for execution having been now made, a sale proclamation was issued for sale in three lots, the property purchased by the appellant being mentioned as the first to be sold. The appellant objected and his objection was rejected by both the Courts below on the ground that he has no *locus standi* under section 244 of the Code of Civil Procedure.

Against that decision of the Courts below this appeal has been preferred; and the learned Judges before whom the appeal came on for hearing were of opinion that the decision was wrong. But as it is supported by the rulings of this Court in the cases of *Narain Acharjee* v. *Gregory*(1), and *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury*(2), they have referred the matter to a Full Bench.

The referring order, it is true, refers to the Full Bench only the question "whether the cases of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*(2) and *Narain Acharjee* v. *Gregory*(1), so far as they decide that a purchaser at an execution sale of the equity of redemption in mortgaged properties cannot come in execution proceedings under a decree upon the mortgage as a representative of the judgment-debtor under section 244, are rightly decided," whereas under Rule II of the Rules of the Court relating to Full Bench References (Chapter V of the Rules of this Court as published in

(1) 8 W. R., 304. (2) I. L. R., 16 Calc., 355.

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1891), the whole appeal ought to have been referred to it; but that does not make any difference in this case, seeing that the question referred to us is the only material question in the appeal, and the determination of the appeal depends upon the determination of that question. If the appellant is the representative of the judgment-debtor within the meaning of section 244 (*c*), then as the questions raised by him in the first Court were questions relating to the execution of the decree, they must be determined by that Court, and he is clearly entitled to be heard. If, on the other hand, he is not a representative of the judgment-debtor within the meaning of that section, this appeal will fail as well on the merits as on the preliminary ground that no appeal lies.

The answer to the question stated in the reference, and the decision of this appeal, depend upon the meaning of the word 'representative' as used in section 244 with reference to the judgment-debtor. It may have only the meaning ordinarily attached to the expression 'legal representative;' that it includes only the heir, executor or administrator of the judgment-debtor, but not the purchaser of the judment-debtor's intetest, whether the purchase is made at a private sale or at an execution sale, as was held by the Allahabad High Court in *Zauki Lal* v. *Jawahir*(1), and *Jagat Narain* v. *Jagrup*(2); or it may mean a representative in interest, and include a purchaser of the judgment-debtor's interest who, so far as that interest is concerned, is bound by the decree, whether the purchase is made at a private sale or at an execution sale, as was observed by Pontifex, J., in *Rash Behary Mookhopadhya* v. *Surnomoyee*(3); or it may have a meaning intermediate between these two, being neither so narrow as the former, nor quite so broad as the latter, that is, it may mean a representative in interest and include a purchaser at a private sale of the judgment-debtor's interest who is bound by the decree, but not a purchaser at an execution sale, as was held by this Court in *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*(4). One thing, however, is clear; even if the word has either of the two comprehensive meanings and includes a purchaser of the interest of the judgment-debtor, such a purchaser must be one who is affected by the decree; but a purchaser of the interest of a party to a suit who is not affected by the decree cannot in any sense be regarded as a representative of that party within the meaning of section 244. Upon this point the authorities are all at one—see *Rash*

(1) I. L. R., 5 All., 94.
(2) I.L.R., 5 All., 452.
(3) I.L.R., 7 Calc., 403.
(4) I.L.R., 16 Calc., 355.

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Behary Mookhopadhya v. *Surnomoyee*(1), *Zauki Lal* v. *Jawahir*(2), *Shivram Chintaman* v. *Jivu*(3). And this is conceded in the argument on behalf of the appellant, which proceeded on the assumption that the appellant as purchaser of part of the mortgaged property after the passing of the mortgage decree was bound by that decree.

The questions that arise for consideration, therefore, are—

First.—Whether the term 'representative' as used in section 244 when taken with reference to the judgment-debtor means only his legal representative, that is his heir, executor or adminstrator, or whether it means his representative in interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree; and,

Second.—Whether if the term has this latter meaning, there is any reason for excluding from its signification an execution purchaser of the judgment-debtor's interest.

As to the first question, one reason for taking the term in its limited sense as including only the heir, executor or administrator, is thus stated by Oldfield, J., in his judgment in *Jagat Narain* v. *Jagrup* (4):—"In my opinion the word representative used in section 244 was not intended to include purchasers of a judgment-debtor's property. We find special provision in the Code for enabling transferees of decrees by assignment or operation of law to execute their decrees by section 232, and for a decree-holder to execute a decree against the legal representative of a deceased judgment-debtor (section 234). Had it been intended to give power to execute a decree against an assignee of a judgment-debtor, some similar provision to that in section 234 would probably have been made to effect that object; and its omission, coupled with the fact which is significant that 'legal representatives' as used in section 234 is confined to the heirs of a deceased judgment-debtor, may lead to the inference that the word 'representative' in section 244 has no more extended meaning than heir, devisee or executor, which also is the proper signification." Another reason in favour of the same view is said to be founded on the inconvenience which would result if the opposite view were held to be correct, and the purchaser of any small portion of the judgment-debtor's property were held entitled to come in as a representative of the judgment-debtor.

These reasons are no doubt entitled to consideration. But it should be borne in mind that it is not every purchaser of the judgment-debtor's property that is sought to be included in the

(1) I. L. R., 7 Calc., 403. (2) I. L. R., 5 All., 94.
(3) I. L. R., 13 Bom., 34. (4) I. L. R., 5 All., 452.

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term "representative" of the judgment-debtor under section 244. It is only where the purchaser of the judgment-debtor's property is, so far as such property is concerned, bound by the decree that the purchaser according to the appellant's contention should be held to come within the meaning of the term, and in such a case it is difficult on principle to maintain that the purchaser is not a representative in interest of the judgment-debtor, or to deny him a hearing if he has any objection to urge against the execution. He is bound by the decree and is affected by the execution proceedings so far as they relate to the property purchased by him; while, on the other hand, the party who stands on the record as the judgment-debtor may be wholly unconcerned so far as the execution goes against such property, for the simple reason that he has no longer any interest in it. In such a case the execution is really proceeding against the purchaser, though nominally against the judgment-debtor on the record; and to allow it to go on without hearing the objections of the purchaser when he may be prepared to show that execution ought not to proceed as prayed, by reason of the decree being barred or satisfied, or for any other good reason, would be to take a course fraught with such manifest hardship to the purchaser that I should hesitate to affirm it as correct, unless the law was quite clear on the point. But is the law so clear? I cannot say that it is. The Code of Civil Procedure in section 244 uses the term 'representative,' which may well include a 'representative in interest,' that is, a purchaser of the interest of the judgment-debtor in any property, which is affected by the decree, and this is the view taken by Mr. Justice Pontifex in *Rash Behary Mookhopadhya* v. *Surnomoyee*(1). The only case in this Court to which our attention has been called as apparently taking the opposite view is that of *Narain Acharjee* v. *Gregory*(2); but upon examination that case does not appear to be one in point. There the decree sought to be executed was, as the Court found, a mere money decree, and the purchaser, who was held not to be a party to the suit nor the personal representative of a party, and therefore not entitled under section 11 of Act XXIII of 1861 to appeal against the order of the lower Court disallowing his objection, was a purchaser of the interest of the judgment-debtor in certain property not covered by the decree. As for the case of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*(3), though it decides that an execution purchaser of the judgment-debtor's

(1) I.L.R., 7 Calc., 403. (2) 8 W.R., 304.
(3) I.L.R., 16 Calc., 355.

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interest is not his representative within the meaning of section 244, yet it also expressly decides that a purchaser of the judgment-debtor's interest of a private sale is. I may adhere that the object of section 244 being to prevent multiplicity of litigation, it should, as has been observed both by this Court and by the Privy Council—see *Punchanan Bandopadhya* v. *Rabia Bibi*(1) and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2)—receive a liberal interpretation.

Thus, while the balance of authority in this Court, if not decidedly in favour of, is certainly not opposed to, the view that a purchaser of the judgment-debtor's interest, who so far as that interest goes is bound by the decree is his representative within the meaning of section 244, the balance of reason is clearly in favour of that view.

It remains now to consider whether there is any valid reason for limiting the signification of the term 'representative' so as to exclude an execution purchaser of the judgment-debtor's interest. As far as I can see there is no distinction in principle between the case of a purchaser of the judgment-debtor's interest at a private sale and that of a purchaser of his interest at an execution sale, so long as they are both bound by the decree in regard to the interest acquired by purchase. At one time there was some conflict of opinion as to the application of the doctrine of *lis pendens* to the case of the latter [see the case of *Gourmoney* v. *Read*(3)], referred to in the judgment of this Court in *Rajkishen Mookerjee* v. *Radha Madhub Holdar*(4). But the question must now be taken to be practically settled by the decision of the Privy Council in *Radha Madhub Holdar* v. *Monohur Mukerji*(5), and it must be held that an execution purchaser is bound by the doctrine of *lis pendens* quite as much as a purchaser at a private sale. The appellant made his purchase after the decree in the mortgage suit and before it was satisfied. His purchase is therefore subject to the rights created by the decree. But it is not necessary to discuss this point any further, as there is no question raised on either side as to the appellant being bound by the decree, and the arguments on both sides proceeded on the assumption that his purchase was subject to the rights created by the decree.

Of the two cases mentioned in the referring order I have already considered one, namely, the case of *Narain Acharjee* v. *Gregory*(6) and that is clearly distinguishable from the present. The other case, namely, that of *Gaur Sundar Lahiri* v. *Hem Chunder Chowdhury*(7),

(1) I.L.R., 17 Calc., 711 (718).
(2) I.L.R., 19 Calc., 683.
(3) 2 Taylor & Bell, 83.
(4) 21 W.R., 349.
(5) I.L.R., 15 Calc., 750; L.R., 15 I.A., 97.
(6) 8 W.R., 304.
(7) I.L.R., 16 Calc., 355.

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is no doubt in point, and requires examination. The ground of decision, so far as the point under consideration is concerned, is stated by the learned Judges in their judgment in these words: "The plaintiff, Hem Chunder Chowdhury is a purchaser in execution of a money decree against the mortgagors. He is consequently not a voluntary purchaser, and as has been held by their Lordships of the Judicial Committee of the Privy Council, his title is not one of privity with the mortgagors, but in some respects adverse to them. We think, therefore, that he cannot be considered as a representative of the judgment-debtors, mortgagors within the terms of section 244. The cases to which we refer are *Dinendro Nath Sannial* v. *Ram Kumar Ghose*(1), and *Anandmayi Dasi* v. *Dharandra Chandra Mukerji*(2), and we may also refer to *Lala Probhu Lal* v. *Mylne*(3).

It is true that an execution purchaser makes his purchase, not from the judgment-debtor and often against his wish, and he is not bound by some of the acts of the judgment-debtor, such as alienations made by the latter to defeat the decree; but that does not show that his rights are not derived from the judgment-debtor, or that he is not the representative in interest of the judgment-debtor in any sense or for any purpose. Even a purchaser at a private sale is not bound by any prior alienation made by the vendor to defraud him (see section 53 of the Transfer of Property Act); but that does not show that such purchaser is not a representative in interest of the vendor. As for the cases relied upon in the judgment in *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*(4), the two Privy Council decisions do not in my opinion afford any basis for the broad proposition deduced from them. The first mentioned case, *Dinendro Nath Sannial* v. *Ram Kumar Ghose*(1), decides that the rights of a purchaser at a sale in execution of a decree are in some respects superior to those of a purchaser at a private sale, the former acquiring the property freed from all alienations or incumbrances affected by the judgment-debtors subsequently to the attachment in execution of decree. In the second case that of *Anandmayi Dasi* v. *Dharandra Chandra Mukerji*(2), their Lordships say "that the title of a judgment creditor, or a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor."

(1) I.L.R., 7 Calc., 107; L. R., 8 I.A., 65.
(2) 8 B.L.R., 122; 16 W.R., P.C., 19.
(3) I.L.R., 14 Calc., 401.
(4) I.L.R., 16 Calc., 355.

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and they hold "that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor or holding so as to be an acknowledgment of the continuance of the title of the mortgagor."

These cases only show that the rights of an execution purchaser are in some respects different from those of a purchaser at a private sale; but because that is so, it does not follow that the execution purchaser is not to be regarded as a representative in interest of the judgment-debtor even in those respects in which, and for those purposes for which, his rights are no higher than those of the judgment-debtor whose right, title and interest he has purchased; where, as in this case, it is admitted that the purchaser at a sale in execution of a money decree is bound by the mortgage decree sought to be executed, in the same way as the judgment-debtor is bound, it is difficult to understand why he should not be treated as a representative in interest of the judgment-debtor.

The third case relied upon in the judgment in *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*(1), namely, that of *Lala Prabhu Lal* v. *Mylne*(2) does not require any detailed examination, as it is based chiefly upon the two Privy Council decisions just referred to.

On the other hand, in the recent case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy*(3), their Lordships of the Privy Council have held that the equitable principle of estoppel laid down in the case of *Ram Coomar Koondoo* v. *Macqueen*(4), which applies to any person is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree.

For the foregoing reasons I am of opinion that the question stated in the referring order should be answered in the negative, and that the appellant shoud be held entitled to be heard in support of his objections as a representative of the judgment-debtor within the meaning of section 244 (*c*) of the Code of Civil Procedure.

I would accordingly decree this appeal with costs, set aside the orders of the Court below, and send the case back to the first Court with directions to hear and determine the objections urged by the appellant.

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(1) I.L.R., 16 Calc., 355.
(2) I.L.R., 14 Calc., 401.
(3) I.L.R., 22 Calc., 909.
(4) 11 B.L.R., 46 : 18 W.R., 166.

1896.

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NOTE.

It was held in this case that the term 'representative' as used in Sec. 244, C. P. C., when taken with reference to the judgment-debtor does not mean his legal representative only, that is, his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest who so far as such interest is concerned is bound by the decree. As was pointed out in the case of *Asgar Ali* v. *Azaluddin Kazi*, 9 C. W. N. 134, the essence of the principle which underlies the decision of the Full Bench is that a transferee of the interest of the judgment-debtor in order that he may be clothed with the legal character of his representative must be bound by the decree, and therefore liable to be affected by the execution proceedings, so far as they relate to the interest acquired by him. The essential criterion is not the point of time at which he acquired his interest but the nature of the decree and the nature of his purchase; if as purchaser he is bound by the decree and consequently affected by the sale, he must be regarded as the representative. It follows therefore that where the landlord of an occupancy holding obtains a decree for rent against his registered tenant, an unregistered transferee of the tenant into whose hands a portion of the holding has previously passed, is a representative of the judgment-debtor because he is bound by the decree in the sense that a sale in execution thereof would destroy his interest and pass it to the execution purchaser; he can therefore apply to have the sale set aside on any valid ground under Sec. 244 C. P. C. See also *Surendra* v. *Gopi*, I. L. R., 32 Calc., 1031; *Gopinath* v. *Sajani*, 10 C. W. N. 240; *Peari Lal Singh* v. *Chundi Charan*, 5 C. L. J., 80.

PROSUNNO KUMAR SANYAL

v.

KALI DAS SANYAL.*

[*Reported in I.L.R., 19 Calc., 683.*]

1892.
May, 14.

Their Lordships' judgment was delivered by

Lord Macnaghten.—The suit in this case was brought for the purpose of setting aside the sale of a *zemindari* in the district of Pabna called Futtehpore, which was sold in execution of a civil decree on the 10th of July, 1883. The Subordinate Judge dismissed the suit on preliminary grounds, without going into the merits. The High Court at Calcutta affirmed his decree.

It appears that some time before 1880 the respondent, Protab Chunder Banerji, recovered against the appellants, and certain persons who were co-sharers with them in Futtehpore, a decree for possession of some lands in dispute, and also a money decree for mesne profits and costs. In execution of that decree Futtehpore was attached. Thereupon, as the appellants alleged, they and two other persons, who were co-plaintiffs in the suit before the Subordinate Judge, paid their quota of the judgment-debt, and came to an arrangement with the judgment-creditor that their shares should be exempted from sale. The shares of the other co-sharers were alone put up for sale, and they were sold on the 10th of February, 1882. Afterwards this sale was set aside, the attachment was revived, a fresh sale took place, and on the 10th of July, 1883, the whole of Futtehpore was sold. The allegation in the plaint is that the setting aside of the first sale, the revival of the attachment, and the second sale, in which the shares of the plaintiffs were sold with the rest, were brought about by fraud and collusion on the part of the other co-sharers, the judgment-creditor, and the auction purchasers, who were all made defendants. No particulars of the alleged fraud and collusion are given. The charge is general and perfectly vague. If it means anything, it can only mean that the judgment-creditor broke his alleged agreement with the plaintiffs, and that the other persons alleged to have been implicated, being aware of the circumstances, took some part in the transaction.

Both Courts have held that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that in such a case as the present a

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Present :—Lords Hobhouse, Macnaghten, Hannen, and Sir R. Couch.

1892.

Prosunno Kumar Sanyal. v. Kali Das Sanyal.

separate suit for the purpose of setting aside an execution sale is expressly forbidden by section 244 of the Civil Procedure Code.

Mr. Doyne, who appeared for the appellants, admitted that the question at issue was one "relating to the execution, discharge, or satisfaction of the decree." But he argued with much ingenuity that the suit was not barred by the provisions of section 244, because the question concerned the auction purchasers as much as any body, and therefore, as he contended, it could not properly be described as a question "arising between the parties to the suit in which the decree was passed." At the same time he admitted that he was unable to produce any authority for his contention, and he also admitted that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution sale.

As the point appeared to be one of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under section 244 of the Civil Procedure Code. An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodar Akharam Gujar*(1) and *Kuriyali* v. *Mayan*(2), has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question.

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section.

Their Lordships will, therefore humbly, advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

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(1) I.L.R., 9 Bom., 468. (2) I.L.R., 7 Mad., 255.

1892.

Prosunno Kumar Sanyal
v.
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NOTE.

This case laid down the principle that when an execution sale is impeached on the ground of fraud, the question must be determined upon an application made under Sec. 244, C.P.C., and not in a separate regular suit instituted for the purpose. Of course if the decree itself be impeached on the ground of fraud, a regular suit will lie to set aside the sale. See *Ram Narain* v. *Shew Bhunjan*, I. L. R., 27 Calc., 197, which shows that even though there is no decree to be actually set aside (it having been previously set aside as an *ex parte* decree improperly obtained), a suit lies to set aside the sale on the ground that the decree on which it was founded, was obtained by fraud. See also *Debendra Nath* v. *Prosunno Kumar*, 5 C. L. J., 328.

Under the Civil Procedure Code, of 1882, it was held that an application to set aside a sale on the ground of fraud could be made within three years from the date of the sale under Art. 178 of the Limitation Act, as it was an application for which a shorter period of limitation was not prescribed by the Limitation Act of 1877. See *Nimai Chand* v. *Dinanath*, 2 C.W.N. 691 ; *Moti* v. *Kunjick*, I.L.R., 26 Calc. 326 ; *Bhuban* v. *Nanda*, I.L.R., 26 Calc., 324 ; *Hiralal* v. *Chandrakant*, I.L.R., 26 Calc., 539.

The Civil Procedure Code of 1908 has changed the law in this respect as it places an application to set aside a sale on the ground of fraud on the same footing as an application to set aside a sale on the ground of material irregularity (Order XXI Rule 90). It follows therefore that applications to set aside a sale on the ground of fraud will be subject to the same rule of limitation, the same rule of appeal and the establishment of the same conditions as an application to set aside the sale on the ground of irregularity.

ZAIN-UL-ABDIN KHAN

v.

MUHAMMAD ASGHAR ALI KHAN. *

[*Reported in I. L. R., 10 All., 166; L. R., 15 I. A., 12.*]

1887.

December, 3.

Their Lordships' judgment was delivered by—

Sir **B. Peacock.**—In this case the plaintiff sued several defendants, claiming to set aside certain auction sales which had taken place under a decree of the Subordinate Judge of Moradabad, and for an order that the plaintiffs be put into absolute possession of the properties which were sold and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as joint action as regards all the property, but as an action against the several defendants as regards the properties of which they were severally purchasers.

Some of the defendants were the decree-holders, and some were persons who came in under them; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued. The circumstances are peculiar. The plaintiffs in the suit in which the execution was issued sued the present appellant in the Court of the Subordinate Judge of Moradabad to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present appellant to the plaintiffs in that suit, and a large amount alleged to be due from the appellant as dower to their mother, whom they represented. The defendant in that suit—the present appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he, the then defendant, was not a resident in the district of Moradabad, but a resident in foreign territory, namely, Jaipur. But the Subordinate Judge decided that he had jurisdiction and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes and on account of the dower.

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* *Present:* Lord Fitzgerald, Sir B. Peacock, and Sir R. Couch.

1887.

Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan.

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court and remanded the case to be tried upon the merits. The High Court, when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge in respect of the dower and of the promissory notes, but affirmed his judgment as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgment of the Privy Council, and before the decree of the High Court which reversed a part of the original judgment of the Subordinate Judge, the plaintiffs in that suit, who are now some of the defendants, executed their decree, and several sales took place under that execution. Under the first sale a certain amount was realized which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the defendants, Asghar Ali, purchased *bonâ fide*, he not being a party to the original decree.

The plaintiff brought his suit on the 22nd of February, 1881, not only against the decree-holders who had purchased under the execution, but as against the *bonâ fide* purchaser who was no party to the decree.

Pending the suit certain other defendants were added, as appears at page 2 of the record. The entry on the record is as follows:—"According to the order dated 17th January, 1882, Har Sarup, Parshadi Lal, and Jiwa Ram, auction-purchasers, were, joined as defendants." The three defendants who were then joined were no parties to the decree, so that there are two sets of defendants in the suit: the decree-holders who purchased under their own execution; Asghar Ali, who purchased a portion of the property of the plaintiff, being a *bonâ fide* purchaser and a stranger to the decree; and the three other defendants, who were alleged to be auction purchasers under the decree and who were no parties to it.

The plaintiff claimed that "the auction sales of the disputed property detailed in the plaint, held on 20th November, 1874, 20th November, 1875 and 15th November, 1876, be declared null and void, and the sale deed in favour of Shaukat Husain Khan, dated 2nd November, 1880, so far as it appertains to the plaintiff's claim, be set aside." Thus he claimed to set aside all the auction sales, not only as against the decree-holders who had purchased, but as

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against *bonâ fide* purchasers who were no parties to the decree. Secondly, he claimed that "plaintiff be put in absolute possession of the under-mentioned property of the value of Rs. 21,450 after dispossession of the defendants."

Amongst other issues, one was whether the auction sale and the purchase, having been made *bonâ fide*, could be invalidated or set aside by the modification of the decree, and whether the limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. In Bacon's Abridgement, Title "Error," it is laid down, citing old authorities, that "if a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at Calcutta. They are collected in a note in Broughton, in his book on the Code of Civil Procedure, fourth edition, note to s. 246, Act VIII of 1859. So in this case, those *bonâ fide* purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the defendants were bound to restore the property; not only the decree-holders who had purchased, but the defendants who had purchased *bonâ fide*, not being parties to the decree. In his judgment he says:—"The limitation period of one year has nothing to do with this case. The cause of action having accrued to plaintiff on the 1st March, 1880, the date when the decision was modified, and as he instituted the claim on 22nd February, 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the plaintiff had a right to recover, not only as against the decree-holders, but as against the *bonâ fide* purchasers, who were no parties to the decree under which they purchased and he decreed the plaintiff's suit. The

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defendant Asghar Ali and the three added defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that decision. They passed two decrees, one, as regards the three appellants who were the added defendants, and the other as against Asghar Ali; but they are both in similar words. They said:—"Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the plaintiff's claim was dismissed, not only as regards the defendants who had appealed, but as regards the other who had not appealed. The decrees must, however, be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge.

Their Lordships, therefore, will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the plaintiff only so far as his suit related to the defendants who had appealed to the Court, and that being so treated, they ought to be affirmed, and that the decree of the Subordinate Judge should be reversed so far only as it related to the plaintiff's claim against those defendants. Their Lordships also think that the appellant must pay the costs of the respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court they treat them merely as decrees in favour of the defendants who were appellants to the High Court.

Appeal dismissed.

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NOTE.

This case lays down the principle that if a decree-holder purchases in execution of his own decree, upon reversal of the decree, the sale must be set aside. It is otherwise, if the purchaser at the execution sale is a stranger; if the decree be subsequently reversed on appeal, the stranger is entitled to retain his purchase. The principle upon which this rule is based is explained fully by Sir Barnes Peacock in *Jan Ali* v. *Jan Ali*, 1 B. L. R., A. C. J., 56. For applications of the principle reference may be made to the cases of *Mahheda* v. *Gopal*, I. L. R., 26 Calc., 734, *Umed Mal* v. *Srinath Roy*, I. L. R., 27 Calc., 810, and *Chandan* v. *Ramdeni*, I. L. R. 31 Calc. 499, the last two cases show that the sale may be set aside by an application under Sec. 244, C. P. C. Reference should also be made to the decision of the Privy Council in *Kewal Mahto* v. *Ramkishen*, I. L. R., 14 Calc., 18, L. R. 13 I. A. 106 and of the Full Bench of the Bombay High Court in *Shiv Lal* v. *Shamlal*, I. L. R. 29 Bom. 435.

(iii) LIMITATION.

RUDRA KANT SURMA SIRCAR

v.

NOBO KISHORE SURMA BISWAS.*

[*Reported in I. L. R., 9 Calc., 663.*]

1883.
March, 9.

The following judgments were delivered by the Full Bench—

No. 434 of 1881.

Garth, C. J.—I think that the question referred to us should be answered in the affirmative.

It seems to me that the provisions in the Limitation Act, which relieve minors and others under disability from the rules which are binding upon other people, *are purely personal exemptions*, and must be considered as attaching to the person only, and not to the property, or the title, of those who are under disability.

The only reason, I conceive, why such persons are not subjected to the ordinary rules of limitation, is that the law considers them incapable of forming a proper judgment as to bringing suits, or otherwise managing their own affairs.

But this reason does not apply to the property of such persons, or the titles by which they hold it; nor does there seem to be any good ground why the protection thus afforded to them should be extended to purchasers from them.

It may perhaps seem rather hard, that in a case like the present, a man purchasing property from a minor, which is not in the minor's possession, should at once be disabled from bringing a suit to recover it; but after all, this is only one of those difficulties, against which purchasers, if properly advised, can easily protect themselves. In this particular instance, the plaintiff, instead of taking from the minor an absolute transfer of property, which was not in his possession, might have entered into a contract for purchase, to be completed when the property had been recovered by suit.

But, on the other hand, if the law were, as the plaintiff contends, that a purchaser when he buys property from a person under disability buys the exemption from limitation along with it, anomalies without end would be the consequence.

**Present:* Sir RICHARD GARTH, Knight, Chief Justice, Mr. Justice MITTER, Mr. Justice MCDONELL, Mr. Justice PRINSEP, and Mr. Justice WILSON.

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Thus a minor of three years old, who had been out of possession of property for two years, might transfer it to a person of full age. The purchaser, if the minor were an Englishman, would then have 18 years within which to bring his suit, although during all that time he would be under no disability and perfectly capable of managing his own affairs.

Again, a purchaser buying the estate of a lunatic, who continued to be a lunatic for 60 or 70 years after the sale, would, during the whole of that period, be freed from the law of limitation; and the person in possession of the property might, after the lapse of 60 or 70 years, be sued by the purchaser, or his heirs, who had no excuse during all that time for sleeping upon his rights.

I entirely agree with the learned Judges who decided the case of *Mahomed Arsud Chowdhry* v. *Yakoob Ally*(1), with regard to the proper construction of s. 7 of the Limitation Act of 1871; and I think also, that the fact of the minor's representative in interest being expressly allowed by that section a certain time for bringing his suit, *in those cases where the minor dies during the disability*, seems clearly to indicate the intention of the Legislature, that in other cases the assignee of a minor is to have no special privilege.

But apart from what I consider to be the meaning and the reason of the Limitation Act, I think an extremely strong argument against the plaintiff's contention arises from the fact, that our attention was not called to a single authority (except the case just cited), in which any attempt has been made to extend the exemption which is given to persons under disability to purchasers from those persons. If there had been any ground for the plaintiff's contention, we should have expected points of doubt and difficulty to have constantly arisen from such a state of the law.

I think, therefore, that this appeal should be allowed; that the decision of the lower appellate Court should be reversed, and the judgment of the Munsiff restored, and I also think that the defendant should have his costs in all the Courts.

No. 1927 of 1881.

I think that this case must be governed by the same principle as the other; and that consequently the judgments of the lower Courts should be set aside, and the plaintiff's suit dismissed with costs in all the Courts.

Mitter J.—I am also of opinion that the question referred to us should be answered in the affirmative.

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(1) 15 B. L. R., 357.

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The express mention of the legal representatives in the third paragraph of s. 7 clearly indicates that the representatives in any other case do not take any benefit under it. But it has been said that the express mention of the legal representatives was made, because in the case of death under disability, it was necessary to prescribe a new point of time from which limitation was to run. But suppose the property of a person, who was under disability at the time when he became entitled to institute a suit in respect of it, be sold, and after the sale he dies, the provisions of the third paragraph of s. 7 would not apply to the purchaser. This being so, if the provisions of s. 7 would apply at all to the purchaser, his case must come under the first paragraph of the section qualified by the proviso.

But the language of the first paragraph cannot be made applicable to a case like the one supposed. It provides that the suit may be instituted within the same period after the disability has ceased as would otherwise have been allowed. But in the case supposed there could not be any *cessation of disability*, because the death took place when the disability was continuing.

It has been suggested that the disability in the section means the disability to sue, and it may be reasonably considered to have ceased on the sale of the property in respect of which the person under disability is entitled to bring a suit; and therefore in the case of a sale the time would run, under the first paragraph of the section from the date of the sale.

But it seems to me that this construction is not borne out by the language used by the Legislature. The section speaks of the cessation of the disability, *i.e.*, the disability of the person who was entitled to the property. By the sale of the property his disability does not come to an end. The *ability* of the purchaser to institute the suit is not the same thing as the cessation of the disability of the person whose property is sold. Then, again, suppose the person on whose behalf the property is purchased is himself a minor, or insane, or an idiot, the date of the sale in that case could not reasonably be considered as the cessation of the disability. It would be almost impossible to apply the language of paragraph 1 of the section to a case like that.

I entirely agree with the learned Judges who decided the case of *Mahomed Arsud Chowdhry* v. *Yakoob Ally* (1), in thinking that the privilege under s. 7 is purely a personal one. It has been said that

(1) 15 B.L.R., 357.

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this construction leads to anomalous results: because there may be cases in which the right in a particular property may be still vested in a minor, or insane, or an idiot, and yet such right would not be saleable. There is no incongruity in this, because the privilege granted is to the minor, insane, or the idiot himself, but not to a stranger, who may choose to become a purchaser. Then as to the creditors of such persons, they cannot complain of any hardship, because they cannot reasonably claim any higher rights than they could have claimed if their debtors had not been under any disability. Then again the existence of a right does not carry with it, necessarily, the power of alienation of such right. For example, the right to recover a contract debt is not extinguished after the lapse of the period of limitation prescribed for enforcing it (see s. 28 of the Limitation Act), still it is not alienable after the lapse of that time in the same sense in which the right of a minor, insane, or an idiot in a particular property, movable or immovable, in respect of which he is entitled to bring a suit is not alienable after the lapse of the ordinary period of limitation.

On the other hand, any other construction of the section would lead to incongruous results. For example, the case of a purchaser buying the estate of a lunatic, which has been put as an illustration by my Lord the Chief Justice, shows how inconvenient it would be if the construction put by the lower appellate Court be adopted.

McDonell, J.—I would answer in both these cases the question referred to us in the affirmative, and generally for the reasons given by the Chief Justice and Mr. Justice Mitter.

Prinsep, J.—I agree in holding that under the terms of s. 7 of the Limitation Act XV of 1877, the privilege conferred is personal to minors, insanes, or idiots, and cannot be transferred *inter vivos*. I am not prepared to say whether this was intentional, or is due to an oversight on the part of the Legislature.

Wilson, J.—The questions raised in these cases are, to my mind, questions of considerable difficulty. I have felt grave doubts as to how they ought to be answered, and those doubts have not been removed. I agree that the construction placed upon the Act by the majority of the Court is one which it may fairly bear; but it involves serious anomalies and inconveniences. Thus, as appears from the first of the cases referred, a person who has just come of age may have property, and yet be practically unable to sell or dispose of it in any way. It appears from the second case that the same person, whether still under age or not, may have property, and the right to

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sue for it at any time for years to come; but that the property is wholly out of reach of his creditors.

If it be said that the difficulty may be removed by the purchaser's obtaining a power-of-attorney to sue in his vendor's name, there seem to be several answers. That is a mode of procedure not in ordinary use in this country. It would not be available for a purchaser in execution; and if it were, an infant cannot give a power-of-attorney. And if the infant did sell after he came of age with a power-of-attorney, the right of the purchaser would still be wholly dependent upon the life of his vendor. If the vendor died before suit, no suit could be brought. If he died pending the suit, it could not be revived, for the cause of action would not survive.

I am by no means sure that another construction of the Act is not equally legitimate, and one which would remove many of these anomalies. I am by no means sure that we ought not to hold that the person who is or has been under disability, having in him a right of property and a right to sue for that property, has a right to assign both, not because there are any words in the Act making them assignable, for there are none, but because property is by the general law ordinarily assignable, and, with it, the right of suit for its recovery. If we were so to hold and also to hold, as I think we well might, that an alienation of an infant's estate is, so far as that estate is concerned, a termination of the disability, we should, I think, get rid of most of the difficulties of the subject. The result would be, that a purchaser of an infant's estate, who purchased after the ordinary period for limitation had passed, would have three years from his purchase within which to sue, and a purchaser from one who had attained his full age would have three years from the date of majority.

I do not dissent from the judgment of the majority, but I feel great doubt about the matter.

NOTE.

The rule laid down in this case, namely, that the provisions of Sec. 7 of the Limitation Act of 1877 extend only to a minor, and under paragraph 3, to his representatives after his death, but not to an assignee from the minor, has been adopted in Bombay. See *Mahadeb* v. *Bahi*, I.L.R., 26 Bom., 730.

MANIRAM SETH

v.

SETH RUPCHAND. *

[Reported in I. L. R., 33 Calc., 1047 ; 4 C. L. J., 94 ; L. R. 33 I. A., 165]

1906.
May, 25.

The judgment of their Lordships was delivered by

Sir Alfred Wills.—One Motiram, of whom the appellant (the plaintiff in the action) is adopted son, and one Rupchand, the respondent and the defendant in the action, were *mahajans* or money-dealers, both residents of Burhampur in the Central Provinces. They had regular dealings with one another from 21st July, 1895, to 12th May, 1898, and at the close of these dealings the respondent owed Motiram Rs. 5,841-9-1 on account of principal, and Rs. 2,801-2-0 on account of interest. No question has been raised as to the correctness of these amounts, if the action be maintainable.

The present suit was brought on 5th September, 1901, to recover these amounts. There is no question that they were due. The respondent admitted in his pleading that they were so, and the only defence is that the action was barred by the lapse of time.

Motiram died on the 6th October, 1898, leaving a will by which the respondent and four other persons were appointed trustees to administer the estate. Three of them, of whom the respondent was one, applied for probate. The application was opposed by the other two and by Kisandas, the natural father of the appellant. Their petition of objections is not in the record, but the reply, signed by the respondent and others, is set out, and from it there can be no doubt that amongst the objections was one on the ground that the respondent owed money to the estate. Paragraph 3 is as follows: "The applicant Rupchand Nanabhai is a big *mahajan* of Burhanpur paying Rs. 106 as income-tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate." This document is dated 28th September, 1899.

The application for probate failed on the ground that the applicants were not legally appointed executors.

There was no application for letters of administration, but in 1901 Kisandas applied for a certificate of guardianship, an application which was opposed by the widow, and in the result Ranchordas, one

* *Present* :—Lord Macnaghten, Sir Andrew Scoble, Sir Arthur Wilson, and Sir Alfred Wills.

of Motiram's head agents, was appointed interim receiver of the estate, until the question of a certificate of guardianship was disposed of.

Ranchordas as next friend of the infant plaintiff instituted the present suit, and on the 4th December, 1901, Kisandas, having obtained the certificate of guardianship, was substituted for him.

A question has been raised as to whether the dealings between the respondent and Motiram were mutual as well as open and current and involved a reciprocal demands between the parties so as to make article 85 of the Indian Limitation Act (No. XV of 1877), Schedule II, applicable. The dealings were certainly not the ordinary ones of banker and customer, but rather in the nature of mutual accommodation, but the view which their Lordships take makes it unnecessary to consider this question, and for the purposes of this case the controversy may be treated as if the sum due to Motiram was a simple debt or series of debts none of which were incurred before 28th September, 1896, since as late as the 24th January, 1897, Motiram, as appears by the summary of accounts appended to the judgment of the Civil Judge (the Court of first instance), had drawn against the respondent for more than the respondent had drawn against him.

The last item against the respondent in account between them is dated 12th May, 1898, and the indebtedness for principal must therefore have been incurred between 24th January, 1897, and 12th May, 1898, and the periods of limitation applicable to the several components of the total demand for principal would expire at various dates between 24th January, 1900, and 12th May 1901. And in the absence of a sufficient acknowledgment before such periods had arrived, the debt or debts would be barred.

An acknowledgment according to the Indian Limitation Act must be signed by the party to be affected by it, and the only document which can be relied upon as an acknowledgment signed by the respondent, is the statement filed by the respondent in the proceedings touching the application for probate, the material part of which has been already set out, but which it is convenient here to repeat. "For the last five years he," (the respondent), "had open and current accounts with the deceased." There can be no doubt that the five years spoken of are the five years before the death of Motiram, *i.e.*, before the 6th October, 1898. On that date the whole of the indebtedness other than interest had been incurred, there having been no dealings, since 12th May, 1898. There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence

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would be that at that date either of them had a right as against the other to an account. It follows equally that whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him.

The question is whether this is sufficient by the Indian law to take the case out of the Statute.

It has been already pointed out that the acknowledgment was made before the statutory period had run out. Thus one requisite of section 19 is complied with. The necessity of signature by the party to be charged is also complied with. The acknowledgment is not addressed to the person entitled, but according to the "explanation" given in section 19 this is not necessary. We have, therefore, the bare question of whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient.

Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian law. The question is whether a given state of circumstances falls within the natural meaning of a word, which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the Statute law of either England or India.

In a case of very great weight, the authority of which has never been called in question, Lord Justice Mellish laid it down that an acknowledgment to take the case out of the Statute of Limitation, must be either one from which an absolute promise to pay can be inferred, or, *secondly*, an unconditional promise to pay the specific debt, or, *thirdly*, there must be a conditional promise to pay the debt, and evidence that the condition has been performed; *In re River Steamer Company, Mitchell's* claim(1). An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an aknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of a

(1) L.R., 6 Ch. App., 822, 828.

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balance in favour of the claimant. It is a case of the third proposition of Lord Justice Mellish, a conditional promise to pay and the condition performed.

There was, therefore, on the 28th September, 1899, a sufficient acknowledgment to give a new period of limitation from the date of the acknowledgment, *viz.*, 28th September, 1899, and the present suit, having been commenced on 5th September, 1901, is within any period of limitation that can be applicable.

The acknowledgment, to which attention has been directed, is followed in the same paragraph by the following sentence: "The alleged indebtedness does not affect his," (the respondent's), "right to apply for probate." Stress was laid by the Civil Judge upon the word "alleged." He was of opinion that the word "had" in the sentence "for the last five years he had open and current account with the deceased" and the word "alleged" were fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shows that there were open accounts at the death of Motiram. If nothing further is alleged, the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this admission. The meaning is "even if there is a balance against the respondent that does not disqualify him from fulfilling the duties of an executor," and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact.

The judgment in the Divisional Judge's Court is also against the acknowledgment. The only reason given is that it would require a considerable stretch of the imagination to place upon it the meaning that there was a right to have the account taken, thereby implying a promise to pay. It has not, however, been argued that there was a promise to pay in any event, and the learned Judge does not seem to have considered the meaning, which appears to their Lorpships to be the natural one, that the words import an admission of liability if the balance should prove to be against the respondent coupled with the fulfilment of that condition, a state of things which in all reason and sound sense places the acknowledgment upon the same footing as an acknowledgment unconditional in the first instance, from which in English law, a promise to pay has always been inferred. The Indian Limitation Act, section 19, however, says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing

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from the English principle that an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing.

The view taken by the Judicial Commissioner is again one with which their Lordships are unable to agree.

He refers to the case of *Sitayya* v. *Rangareddi and others*(1) in which it was held that an acknowledgement of the plaintiff's right to have accounts taken and of the defendant's liability to pay any balance (if such there should be) against him was held to satisfy section 19 of the Limitation Act. But this decision appeared to him to be either erroneous or inapplicable, because it is based upon two English cases, *Prance* v. *Sympson*(2) and *Banner* v. *Berridge*(3), in which similar acknowledgments were held to satisfy the English law upon the subject, the acknowledgment in *Prance* v. *Sympson*(2) being undistinguishable from that relied upon in the present case. He goes on to give as his reason for considering that the English cases do not apply in the present case the fact that the English law requires words from which a promise to pay may be inferred, whereas the Indian Act requires words from which an admission of liability may be inferred. But in English law it is the acknowledgment of liability, which is the ground upon which a promise to pay is inferred, so that the requirements of English law are, if anything, more and not less stringent than those of Indian law, which seems to be a bad reason for holding that the English cases have no application to the present inquiry. The learned Judicial Commissioner further agrees with the Civil Judge in holding that the expression "alleged indebtedness" is a stumbling block in the way of the appellant, a view upon which their Lordships have already expressed their opinion.

In the opinion of their Lordships, therefore, the acknowledgment of the 28th September, 1899, is sufficient to prevent the claim of the appellant from being barred by the Limitation Act. It is, therefore, unnecessary to discuss the other grounds upon which the appellant has relied. Their Lordships would notice only one point in connection with them. The appellant contended that the respondent, whether appointed executor by the will or not, had intermeddled with the property of the deceased, and was at all events executor *de son tort*, and therefore entitled to the benefit of the Limitation Act. The respondent has in this suit admitted in the most definite manner that he did so. In spite of this admission each of the three Courts below has held that he did not, and the respondent's Counsel claimed

(1) (1887) I. L. R., 10 Mad., 259.
(2) (1854) 1 Kay, 678. (3) (1881) L. R., 18 Ch. D., 254; 50 L. J. Ch. D., 630.

that this was a decision on a matter of fact, and that however erroneous it might be, it would be contrary to the practice of the Judicial Committee to entertain the question of its reversal. A careful perusal of the judgments, however, makes it perfectly clear that the only reason for the view taken by the Courts below was that they thought the respondent had not been duly appointed executor, and therefore could not have intermeddled with the estate so as to make himself responsible as executor. Their decision was, therefore, really one of law, and not of fact, and is open to reconsideration.

Their Lordships will humbly advise His Majesty that the judgments appealed against be reversed, and judgment entered for the appellant for principal claimed, with interest at the rate of 7 annas 9 pies per cent. per *mensem* to date of suit, and thereafter at the rate of 6 per cent. per *annum* till payment, and that the respondent be ordered to pay the costs of the appellant in each of the Courts below. The respondent will also pay the costs of this appeal.

Appeal allowed.

NOTE.

This decision of the Judicial Committee defines the essential requisites of a valid acknowledgment under the Limitation Act. No reference however is made to the earlier decision of the Judicial Committee in *Mylapore* v. *Yeo Kay*, L. R., 14 I. A., 168; I.L.R, 14 Calc., 801, which contains observations somewhat difficult to reconcile with the later decision. As to the earlier decision, reference may be made to *Imam Ali* v. *Baijnath*, I.L.R., 33 Calc. 613: 3 C.L.J. 576.

BALWANT RAO

v.

PURAN MAL.*

[*Reported in I. L. R. 6 All., 1; L. R., 10 I. A., 90.*]

1883.
February, 27.

Their Lordships' judgment was delivered by

Sir A. Hobhouse. In this case the plaintiff, who is also the appellant, filed his plaint on the 12th September, 1877, and in it he claimed to remove the defendant, who is the respondent, from the management of the worship and service performed at the temple of the god Ganeshji in Muttra; to remove the power and control of the defendant from the properties belonging to the temple; and to be declared authorized to appoint a second manager for the purpose of carrying out the object of the endowment. The plaint then states shortly the history of the temple; that it was founded by the plaintiff's ancestor, who dedicated property to it, especially the village or *mauza* Mandesi. Then it states that "he"—that is, the plaintiff's ancestor—"entrusted the management of the service and worship to Mangu Chaube, the grand-father of the defendant; and he, during his life time, and after him his son Titri Chaube, have been, according to the intention of the founder of the temple, taking care of it and superintending its affairs. When, in 1865, the plaintiff came to Muttra on pilgrimage, and asked the defendant's mother how the income of the village used to be spent, she refused to render an account of it. The plaintiff's complaint was rejected by the Collector on the 13th September, 1865, on the ground of his having no jurisdiction. The plaintiff then sued in the Settlement Department, but the defendant himself denied the plaintiff's right, and therefore he could not obtain redress from that department. The claim for entry of name was disallowed on 14th May, 1877, and that is the date of the cause of action."

The precise tenor of the plaint cannot be understood without reference to the dates of the transactions and to some of the documents referred to in it. It appears that the foundation by the plaintiff's ancestor was prior to the commencement of the present century, so that for eighty years or upwards the management has been in the family of the defendant. The appellant became the heir, or one of the heirs, of the founder in the year 1847. The defendant's title or possession as manager accrued on the death of

* *Present*:—Lord Blackburn, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

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his father Titri Chaube in the year 1863, when the defendant himself was a child and under the guardianship of his mother. In the year 1865 the plaintiff presented the petition referred to in the plaint, which was for the purpose of having the trusts of the endowment carried into effect by the Collector's Court under Regulation XIX of 1810, which in fact had been repealed some two and a half years previously. But the petition makes a case which, if it were proved, would entitle the plaintiff to have the proper management provided for by a Court having jurisdiction, for it shows that the funds were applied improperly, and it prays that inquiries may be made from the *zemindars* and respectable residents of the city of Muttra, and that the expenses of the Thakurji may be entrusted to the management of experienced hands and learned divines, as provided by the Regulation. The fate of that petition may be divined from the circumstance that the Regulation had been repealed. It was dismissed for want of jurisdiction.

The plaintiff did not then institute any suit in the Civil Court. He took no proceeding until nearly twelve years subsequent to the petition, when he again sought a remedy in the Revenue Department. An order was made by the Settlement Officer on the 14th May, by which it appears that the plaintiff applied to expunge the name of the defendant, who was registered as *muafidar* of the village Mandesi, and for the entry of the plaintiff's name in lieu of that of the defendant. It was ordered that the plaintiff's claim be dismissed.

That dismissal appears to have led to the present plaint, which has been already stated. It appears then that, in 1865, the plaintiff conceived that he had a case of malversation of the property of the endowment against the then manager, who was the defendant's mother, and that he prayed relief on that ground; that having carried his complaint to the wrong Court, and having failed there, he did not pursue the claim any further, but that nearly twelve years afterwards he simply claimed to be entered himself as *muafidar* instead of the defendant; and then he brings the present claim, which is for the purpose of either himself removing or getting the Court to remove the defendant from his position as manager, and for the plaintiff to be allowed to appoint another manager.

Now in the defence, the defendant does not dispute but that the property is an endowment appertaining to the god Ganeshji. He says that the income of it has all along been spent for the purposes of the temple, and the business of the temple is carried on as before. He then pleads the law of limitation as a bar to the suit. In the plaintiff's written statement, a sort of replication, he states this:—"The

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defendant has only since a short time begun to misappropriate the income of the endowed property, contrary to the object of endowment and in contravention of his duty; and he, in the Settlement Department, declared himself, as against the plaintiff, to be the proprietor and *muafidar*." That seems to be in answer to the plea of limitation; namely, that it was only a short time ago that the misappropriation had begun.

The Subordinate Judge finds that the defendant's father in his life time repudiated the plaintiff's right to manage the institution, and that the defendant has followed his father's conduct. "This" he says, "was done in bad faith, and with the hope of escaping the control of a superior over his proceedings, so that he might independently deal with the endowment. This is calculated gradually to ruin the property, to divest the donor of his power, and disturb the management proposed by him." On those grounds he holds that the defendant deserves to be dispossessed.

The Subordinate Judge does not find that there has been any malversation or misappropriation of the property on the part of the defendant. All that he finds is that he opposes the right of the plaintiff. He says in the earlier part of his judgment that the plaint specifies the defendant's misconduct and improper acts, on the ground of which he is said to have rendered himself liable to be removed, but on reading the plaint it is clear that the plaint does not specify any misconduct or improper act, unless it be the resistance to the plaintiff's claim. Neither does the written statement carry the case any further, because, although it uses the expression "misappropriate the income," it does not specify any mode in which the income was misappropriated.

The Subordinate Judge deals with the question of limitation by saying that the defendant has distinctly admitted that the property is an endowment, and that he holds it as manager of an endowment; consequently, he says, his possession cannot, with reference to its very nature, be regarded as adverse. He thinks, therefore, that if the property is affected by trusts, as both the plaintiff and defendant allege, any question is open that may arise between the plaintiff and the defendant respecting the right to manage the trusts. The plaintiff gets his decree upon those grounds, and the defendant appeals to the High Court. The High Court hold that in so far as the suit is for a declaration that the plaintiff is, by right of inheritance, chief manager of the temple services and properties, it falls within Art. 123 of the Limitation Act,—the Act applicable to this suit is Act IX of 1871,—and, in so far as it seeks recovery of

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possession of the temple property, it falls within Art. 145 of the same Act. Therefore they reverse the decree of the Subordinate Judge, and dismiss the suit with costs. The appeal is now presented from that decree, and the question is whether the suit is barred by the Limitation Act of 1871.

The reasons now given for avoiding the bar of limitation are, *first*, that the suit is to be treated as one for the administration of the trusts of the endowment, and that it is open to the Court to dismiss the defendant for misbehaviour in his office, and on this point the plaintiff seeks to incorporate in the present plaint the allegations in his petition of 1865. What other difficulties there may be in the way of such a suit—such as the omission to get the leave of the Court under Act XX of 1863,—their Lordships desire not to discuss on the present occasion, because there is a complete answer to the appellant's argument in the fact that no evidence whatever of misbehaviour on the part of the defendant has been adduced. There is, as has been stated, no direct or sufficient allegation of misconduct in the pleadings. There was no issue framed upon that point, neither has anything been found on that subject by the Subordinate Judge. That ground therefore entirely fails.

The next ground is that the case must be taken as falling within s. 10 of Act IX of 1871, which deals with trust property. That section is as follows :—"No suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time." Their Lordships are of opinion that the expression used by the Legislature, "for the purpose of following in his or their hands such property," means for the purpose of recovering the property for the trusts in question ; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section. But here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a trustee, and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within s. 10 of the

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Limitation Act. If it does not, then it must be within one of the articles of the schedule. Their Lordships do not see any reason to differ from the High Court in thinking that it may fall within Art. 123 or Art. 145, but they desire to express no opinion upon that point, and there is some difficulty in ascertaining the exact nature of the suit, owing to the obscurity with which the plaintiff's title is stated in the plaint. But if it does not fall within either of those sections, then the case is caught by the general Art. 118, which provides for every case that is not previously provided for in the Act. Therefore, either the suit is barred in six years or in twelve years,—it matters not which, for the cause of action arose at all events before the year 1865.

The consequence is that the appeal must be dismissed; and as the respondent does not appear, nothing will be said about costs. Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

NOTE.

This case lays down the principle that when trust property is used for some purpose, other than the proper purpose of the trust in question, it may be recovered without any bar of time, from the hands of the trustee, his legal representatives or assigns (not being assigns for valuable consideration). In other words, in Sec. 10 of the Limitation Act, the words "for the purpose of following in his or their hands such property" mean "for the purpose of recovering the property for the trusts in question." Consequently, if the plaintiff sues only for his personal right to manage, or in some way to control the management of the trust, Sec. 10 does not apply.

See *Jagannath* v. *Ranjit*, I.L.R., 25 Calc. 354; *Ram Kanai* v. *Hari Narain* 2 C.L.J. 546, and *Shama Charan* v. *Abhiram*, I.L.R., 33 Calc. 511: 3 C.L.J. 306.